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# REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

January and June Terms, 1870.

40604 BY THOMAS G. JONES, *State Reporter*.

VOL. XLIV.

MONTGOMERY, ALABAMA:

BARRETT & BROWN, PRINTERS AND BINDERS.

1871.



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# OFFICERS OF THE COURT,

DURING THE TIME OF THESE DECISIONS.

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E. WOLSEY PECK, CHIEF-JUSTICE,

*Tuskaloosa, Ala.*

THOMAS M. PETERS, ASSOCIATE JUSTICE,

*Moulton, Ala.*

BENJAMIN F. SAFFOLD, ASSOCIATE JUSTICE,

*Selma, Ala.*

JOSHUA MORSE, ATTORNEY-GENERAL,

*Montgomery, Ala.*

DANIEL B. BOOTH, CLERK,

*Montgomery, Ala.*

PATRICK RAGLAND, MARSHAL,

*Bellefonte, Ala.*

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REPORTS  
OF  
CASES ARGUED AND DETERMINED  
AT THE JANUARY TERM, 1870.

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GROGAN *vs.* THE STATE.

[APPLICATION IN SUPREME COURT FOR MANDAMUS, OR OTHER APPROPRIATE WRIT, TO COMPEL PETITIONER'S DISCHARGE FROM CUSTODY, UNDER AN INDICTMENT FOR AN ASSAULT WITH INTENT TO MURDER.]

1. *Section 3945 of Revised Code; constitutionality of.*—Section 3945 of the Revised Code is not void for want of conformity to the constitution of this State. (*Adhering to the decision in Hill v. The State*, at June term, 1869.)
2. *Jeopardy; word as used in the constitution defined and explained.*—The constitution of this State forbids that any person shall, for the same offense, be twice put in jeopardy of life or limb. The jeopardy here meant is that which arises on the final trial upon a charge for a criminal offense, and it commences as soon as the parties are at issue upon a sufficient indictment, and the case is submitted to the jury for their verdict. After this is done, the State can not enter a *nolle prosequi* without the consent of the defendant. If this is done, the defendant is entitled to be discharged as upon an acquittal, and this court will so discharge him.

APPEAL from the Circuit Court of Wilcox.  
Tried before the Hon. P. O. HARPER.

The opinion contains a full statement of the facts of the case.

JOHN D. BRANDON, for appellant.—1. What is meant by being put in jeopardy?—See Bouv. Law Dictionary; Con. of the State of Alabama, § 13; see, also, Bill of Rights.

2. If a cause has been submitted to a jury, and some evidence has been offered by the State, a withdrawal of the cause from the jury, unless in one or more of the cases allowed by statute, operates an acquittal.—*People v. Barrett & Ward*, 2 Carnes, 304; *Commonwealth v. Cook*, 6 Serg. & Rawles, 577.

3. A court has the power to discharge a jury in any case of pressing necessity. The judge determines the existence of the facts, and the law determines whether they constitute a case of necessity; that an unauthorized discharge of a jury is equally as fatal to any subsequent trial, as an acquittal or conviction.—See *Ned v. State*, 7 Porter, 187.

4. The discharge spoken of by Story, in his work on the Constitution, § 1781, and Rawle on the Constitution, 132, 133, must be understood to mean a legal discharge; for all the authorities agree in this, that if the prisoner be put on his trial on a sufficient indictment, and the evidence in support of the charge is submitted to the jury, the court can not arbitrarily interfere, and arrest the trial by discharging the jury; and if the court should discharge the jury before they deliver their verdict, without a sufficient legal reason for doing it, the prisoner shall never be tried again.—*Cobia v. The State*, 16 Ala. pp. 781–4.

5. What is a sufficient legal reason for discharging a jury? “If, after a jury retire, one of them becomes so sick as to prevent the discharge of his duty, or any other cause or accident occur to prevent their being kept together for deliberation, they may be discharged.”—Code of Alabama, § 3603. A final adjournment of the court discharges the jury.—Code of Alabama, § 3604.

6. Read, particularly, *McCauley v. The State*, (26 Ala.) from last paragraph on page 138, to first paragraph on page 140.

7. The jury, in their deliberations upon the facts, are as independent of the court, as the judge, in determining the law, is of the jury; and the consequence is, that when a case has been submitted to a jury, there it must remain until it has been decided by them, or is withdrawn from their consideration, not at the will and pleasure of the



court, but under circumstances justified by the law.—*Mahala v. The State*, 10 Yerger, 235.

8. When a jury is empaneled for the trial of an indictment, the defendant then acquires new rights, which the court will protect, (not disregard, as in this case.) When once put on his trial, and a jury sworn for that purpose, it is his right to have them pass upon his case. Their verdict will be a bar to another indictment for the same offense; a *nolle prosequi* will not. He is entitled to his bar. The attorney-general, finding his evidence insufficient, might discontinue for the purpose of commencing another prosecution, and then subjecting the defendant to another trial. This the law will not permit. In this stage of the proceedings, a *nolle prosequi* can not be entered without the consent of the defendant.—*Commonwealth v. Tuck*, 20 Pick. 356; *Mount v. The State*, 14 Ohio, 295. This case is exactly analogous to the one at bar, so far as the right to *nol. pros.* is concerned.

In every trial of an indictable offense, it is an indispensable part of the proof, to be furnished by the State, that the offense was committed in the county in which it is charged in the indictment to have been committed.—*Solomon v. The State*, 27 Ala.; *Brown v. The State*, 27 Ala. 27.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—The appellant, Grogan, was indicted in the circuit court of Wilcox county, on the 28th day of May, 1868, for an assault on Robert Hinton, with intent to murder him. This cause came on to be tried in said court, at the October term thereof, in 1869, when the defendant, having pleaded not guilty, went to trial, with a jury, on that plea. For the purpose of trying the said defendant, a jury of good and lawful men were duly sworn and empaneled by the court, "to try the issue joined." The record then states that, "after the evidence had been gone through with, and the solicitor for the State had opened the case to the jury, and the counsel for the defendant, Grogan, had made their arguments to the jury, the counsel for the defendant, Grogan, having made their point of law to the

court, that the circuit court of Wilcox county had no jurisdiction to try this cause," and the point thus made was sustained by the court, "the solicitor, on behalf of the State, moved the court to enter a *nolle prosequi* in this case, and further moved the court, that the defendant, Patrick T. Grogan, be bound over to appear at the next term of the city court to be held in and for the county of Dallas, in the State of Alabama, to answer such indictment as may be found against him by the grand jury of the circuit court of said Dallas county." To these motions the defendants objected, and insisted, "that the jury be required to render a verdict in said cause." These motions being heard, and argument thereon being had before the court, they were granted, and a *nolle prosequi* was entered by the court against the consent and objection of the defendant, said Grogan. And said Grogan was thereupon required by the court to enter into bond, with security, in the sum of five hundred dollars, conditioned that he appear at the next term of the circuit court of said county of Dallas, and from term to term thereafter until discharged by law, to answer the offense of assault with intent to murder. Said bond being given as required, said defendant was discharged by the court. The court then further ordered, that the clerk of the circuit court of Wilcox county forward to the clerk of the circuit court of Dallas county a certified copy of the judgment and proceedings in the case, which had been entered in said circuit court of Wilcox county. These were recitals made in the judgment of *nolle prosequi*.

There was also a bill of exceptions taken by the defendant on the trial, which shows the same facts as those set out in the judgment of the court above recited; and also, that after the cause had been submitted to the jury, and all the testimony had been closed and the cause partly argued by counsel on both sides, "the State moved to enter a *nolle prosequi*, and to bind the prisoner over to answer the same charge in Dallas county. To this motion the prisoner objected, and insisted that the jury be allowed to pass upon the case, and to return a verdict of guilty or not guilty." The court sustained the motion, and refused to permit the jury to bring in a verdict, and discharged them, and bound

the defendant over to answer the same charge in Dallas county. To all which the defendant excepted, and reserved the same in his bill of exceptions.

From this judgment of the court below the said defendant, Grogan, has appealed to this court, and he here assigns the proceedings in the court below for error; and also moves this court for a *mandamus*, or other proper writ, "to the end that the supreme court will direct the discharge of the said Patrick T. Grogan, as upon a final trial and acquittal on the issues joined on the indictment in the circuit court of Wilcox county."

It also appears from the bill of exceptions, that there was some testimony offered by defendant, that the offense with which the defendant below was charged, had been committed in the county of Dallas, and not within a quarter of a mile of the boundaries of the two counties of Dallas and Wilcox; and also, some testimony offered by the State, showing that the offense was committed within a quarter of a mile of said boundaries.

At the last term of this court, the validity of section 3945 of the Revised Code was considered. It was then declared to be a constitutional law; and we have not since discovered any sufficient reason why that determination should not be adhered to. We are, therefore, satisfied with that exposition of the law, and it is here now again affirmed. *Hill v. The State*, at June term, 1869; Const. Ala. of 1867, § 8; Revised Code, § 3945.

The constitutional guaranty against a second trial for the same offense is in these words, to-wit: "No person shall, for the same offense, be twice put in jeopardy of life or limb."—Const. Ala. 1867, art. 1, § 11.

The question of difficulty is to ascertain when this jeopardy begins; because, until it does begin, it can not be said to exist, and the constitutional protection can not be invoked. Happily, the embarrasment that once encumbered this question has been long since removed. At an early day in the judicial history of this State, this court settled the law to be, that "the unwarrantable discharge of a jury, after the evidence is closed, in a capital case, is equivalent to an acquittal."—*Ned v. The State*, 7 Por. 187, 203. This



decision is in conformity with the law as settled at this day. A recent and carefully prepared work upon the subject of criminal law, lays down the rule in the following terms: "But when, according to the better opinion, the jury, being full, is sworn and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him. During the trial, the prosecuting officer is not authorized to enter a *nolle prosequi*; or, if he enters it, even with the consent of the judge; or, if he withdraws a juryman, and so stops the hearing, the legal effect is an acquittal."—1 Bish. Cr. Law, §§ 856, 858, (3d ed. 1865.) Such a procedure as that shown by the record in this case entitles the defendant to have a verdict of not guilty returned by the jury, and he can not be again brought into jeopardy for the same offense.—1 Bish. Cr. Law, § 858, and notes; *The State v. Slack*, 6 Ala. 676; *Cobia v. The State*, 16 Ala. 781; *McAuley v. The State*, 26 Ala. 135.

Here the jury was regularly sworn and empaneled, the defendant went to trial on his plea, the evidence was closed on both sides, and the argument for the defense was finished. The trial was then stopped, and a *nolle prosequi* was entered without the consent of the defendant and against his objection. Under such a state of facts, the discharge of the jury was an acquittal of the defendant. This is the law, and it must be enforced. The defendant should have been discharged as soon as the *nolle prosequi* was entered. The court erred in failing to do so. And, as he can not be again tried for the same offense, to answer which he was bound over to appear at the Dallas circuit court, the proceedings in the court below are reversed, back to the judgment of *nolle prosequi*, and it is ordered and adjudged by this court, that the appellant, said Patrick T. Grogan, the defendant below, be discharged from further prosecution upon the charge of assault on said Robert Hinton, with the intent to murder him, said Hinton, as made and set forth in said indictment, found in said circuit court of Wilcox county, on said 28th day of May, 1868, and herein above referred to.

There will be no need for a *mandamus* if the order of the court in its judgment in this case is obeyed, as it doubtless will be. Therefore, the questions arising on a consideration of the motion for that writ are not discussed in this opinion.

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• MOORER vs. THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Charge to jury; what should be given, on trial of defendant, where the evidence is chiefly circumstantial.*—On the trial of an indictment for grand larceny, where the testimony against the accused is chiefly circumstantial, a charge asked by the prisoner, “that innocence should be presumed, until the case proved against the prisoner, in all its material circumstances, is beyond any reasonable doubt; and that the evidence ought to be strong and cogent, to find the defendant guilty as charged,” is proper, and should be given.

ARPEAL from the Circuit Court of Wilcox.

Tried before the Hon. P. O. HARPER.

The facts are stated in the opinion.

JOHN McCASKILL, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

[No briefs were filed in this case.]

PETERS, J.—This is an appeal from the circuit court of Wilcox county.

The appellant was indicted for grand larceny, at the spring term of the circuit court of Wilcox county, in 1869. On the trial of this indictment, which occurred on the 4th day of November, 1869, the accused was convicted and sentenced to confinement in the penitentiary for two years. From the bill of exceptions taken on the trial, it appears



that it was proven on behalf of the prosecution, that P. D. Burford, about the last of November, 1868, missed his buck sheep, which was valued at one hundred and twenty-five dollars. And the witness says he "remained quiet for about three weeks, and then, while in search of goods missed out of his own warehouse, he found the hide of his buck sheep in defendant's house;" and "there was no one in the neighborhood but himself and Mr. Cook who owned sheep."

It does not appear that the sheep was proven to be of any value. But the bill of exceptions does not purport to set out all the evidence adduced on the trial. It is presumed that this proof was made.

The accused does not show that he offered any testimony on the trial, but he asked the court to charge the jury on the evidence thus offered: "That innocence should be presumed, until the case proved against the prisoner in all its material circumstances is beyond any reasonable doubt, and that the evidence ought to be strong and cogent to find the defendant guilty as charged."

The proofs in this case were all circumstantial. The sheep was only missed. The owner did not know that it had been stolen, or even that it was dead; except as he inferred this from the skin, which he swore was the skin of the sheep. But this he could only do from the looks of the skin and the character of the wool and its size. These facts all might have exhibited these appearances, and yet the sheep might not have been stolen by the defendant. Again, the only evidence of guilt was the possession of the hide. The possession was only *prima facie* evidence of guilt. It was a fact from which guilt might be legitimately inferred. It might, unexplained, have afforded grounds for a strong presumption of guilt against the accused, but no more. Under such a state of proof the charge was a proper one, and should have been given. It announced an admitted principle of law, and the accused was entitled to the full benefit of it, be that much or little. It was a humane caution to the jury which has ever been encouraged by the law.—*Patterson v. The State*, 21 Ala. 571;

*Ogletree v. The State*, 28 Ala. 693 ; *Dave v. The State*, 22 Ala. 23 ; 1 Gr. Ev. § 35 ; 3 Gr. Ev. §§ 30, 31.

For the error above pointed out the judgment of the court below is reversed, and the cause is remanded for a new trial, and said Moorer will be kept in custody until discharged by due course of law.

## GIBSON vs. THE STATE.

### [INDICTMENT FOR PERJURY.]

1. *Application for habeas corpus ; oath of facts other than those required by statute, immaterial on.*—On an indictment for perjury, the oath of the accused, that “he is the father and proper custodian of Catharine, or Kate, a colored girl,” made upon an application for a writ of *habeas corpus*, to enquire into the imprisonment or restraint of said Catharine, though false, is not enough to sustain a conviction for perjury on said oath. Such oath is immaterial on such application ; it is not one of the jurisdictional facts required by statute.
2. *Habeas corpus ; applicant for writ, how must proceed.*—An applicant for a writ of *habeas corpus* must proceed by petition, which must be signed by the party applying for the writ, or by some person in his behalf ; and the petition must be verified by the oath of the applicant, to the effect “that the statements therein contained are true, to the best of his knowledge, information and belief,” and if any other statement, than those required by law, be introduced in the petition, they can not, though false, be made matter of substance, so that perjury may be assigned of an oath verifying said petition.
3. *Defendant ; when will be discharged on reversal.*—If the matter alleged in such petition may be stricken out as immaterial, and there is nothing else of the oath left, the cause will not be remanded, but the defendant will be discharged on reversal.—Revised Code, § 4316.

APPEAL from the circuit court of Pike.

Tried before Hon. J. McCALEB WILEY.

The facts are fully stated in the opinion.

THOS. G. JONES, and J. D. GARDNER, for appellant.—The

demurrer to the indictment should have been sustained. Section 4262 of the Code prescribes what statements a petition "must contain"; what is material on such application is thus fixed by law. All other statements may be left out of the petition, or if in it, may be stricken out, and still leave the petition perfect. Any thing which may be stricken out of a petition or pleading, and still leave it perfect, is surplusage, and not material. Oath as to mere surplusage and immaterial statements can not support a conviction, or even an indictment, for perjury.

The "issue" on a petition for *habeas corpus*, is the existence of the facts required by § 4262, as pre-requisites for the issuance of the writ. The statement of Gibson, under oath, that "he was the father and proper custodian of Kate," &c., sheds no light upon the existence of the facts required by § 4262, whatever relevancy and materiality such statement might have had on the return of the writ, when the illegality of the detention would have been the issue.

*White v. The State*, 1 Smedes & Marshall, Miss. Rep. p. 156, is identical with the case at bar, and is decisive of it. The facts of that case are very similar to this, and it fully sustains the above argument.

It seems to be the current of authorities, that where a statute makes the existence of certain facts and oath thereof, the only pre-requisites to demanding a right, oath of other facts in connection therewith, however false, is not perjury, but "will be treated as impertinent, and as mere surplusage."—*State v. Helle*, 2 S. C., case 290, p. 8, and authorities there cited; *Silver v. State*, 17 Ohio, (Griswold,) 368, and authorities there cited; cases cited in *State v. Gallimore*, 2 Iredell, R. 374.

The oath required to be administered on an application for *habeas corpus* is fixed by statute, which requires the applicant to swear that the statements of the petition are true, "to the best of his knowledge, information and belief." This oath, in the absence of proof to the contrary, this court is bound to presume was administered. The indictment is defective in not averring that Gibson "*well knew to the contrary*." This was necessary at common law,



and as to cases of this kind the statute has not dispensed with it. The oath, "contrary to affiant's belief," is an essential element to constitute perjury on an oath of this sort. The two forms in the Code apply to cases where witnesses swore falsely on trials in criminal and civil cases. See *Lea v. The State*, 3 Ala. 602; 2 Russ. Crim. Law, 597.

In North Carolina, where the statutes as to indictments are substantially the same as ours in every particular, the supreme court says: "After the very many adjudications which have been had on the statutes, it must be regarded as being now completely settled, that it does not supply nor remedy the omission of a distinct averment of any fact or circumstance, which is an essential constituent of the offense charged."—*State v. Gallimore*, Iredell, 2 Law Rep. N. C., p. 376. In this case seven previous decisions on this point are cited and re-affirmed.

*The indictment is defective both at statute and common law.*

The authority for indictments of this kind, is found in §§ 3558, 4139, Revised Code. There are *only* two forms of indictments for perjury in the Code—forms 44 and 45, p. 812. If this indictment stands at all, it must stand on the two sections and forms referred to above—it is certainly fatally defective at common law. Both forms of indictments are *careful* and *explicit* in showing the character in which the indicted person appeared in the proceedings about which the perjury was committed. One form says, "*A. B., in his examination as a witness*"; the other on application for a continuance, &c., in which said "*A. B. was defendant.*" In the indictment in this case it does not appear in what character Gibson appeared. Was he the applicant, or was he simply a witness on whose affidavit some other person based an application? It is always important to a reviewing court, to know the character in which the indicted person appeared in the proceedings about which the perjury is alleged. The *interest* of a party is often times weighty enough to determine, in connection with other facts (not sufficient alone,) the *animus* of a witness. The indictment is too vague and loose to authorize a conviction on it, even if the accused were ever so guilty. It would



be a dangerous innovation on the *forms* which are essential to the uniform and proper administration of justice.—*Holton v. State*, (Archer & Hogue,) 2 Florida, from bottom page 499, to middle page 500.

The same court says: "It is much easier to require the observance of the mandates of the law, than to determine in what cases they may be safely dispensed with."—*Holton v. State, supra*.

"An indictment can take nothing intendment."—*Seay v. State*, 3 Stewart, p. 130; *Stanton v. State*, 6 Yerger, Tenn. p. 633; 2 Chit. C. L., 287, 432; *Coleman v. State*, 3 Porter.

For aught that appears from this indictment, the facts sworn to may have been the applicant's *idea of the law of his case*. A person may be the father, and yet not the proper custodian of a child—he may have been removed by an order of court from control or custody of his child—or may have parted with the control of the child by apprenticing him out; in either event he would not be the "proper custodian." The indictment should negative both averments. One might be true and the other false. To sustain a conviction in this case, the falsity of both should have been averred and proven. It is not perjury to swear to a mistaken view of what the law is. An indictment and conviction on an indictment, which, when all of its averments, except those of law, are admitted, still admits of *any doubts* as to the indicted person's innocence, are defective.

As to presumptions court will make in cases like this, see *Thrift v. State*, 30 Indiana Reports, p. 42.

If the views here presented as to the immateriality of the false oath are sustained, no further proceedings can be had on this prosecution, and appellant must be released by this court.—§ 4316, *White v. State, supra*; *Allan v. The State*, 40 Ala. 334.

JOSHUA MORSE, Attorney-General, *contra*.—(No brief on file.)

PETERS, J.—Thaddeus Gibson was indicted for perjury at the spring term, 1869, of the circuit court of Pike

county. The indictment contained but a single count. The charge was in the following words, to-wit:

“The grand jury of said county charge, before the finding of this indictment, that *Thaddeous* Gibson, on an application to Willis C. Wood, judge of the probate court in and for Pike county, and State of Alabama, for a writ of *habeas corpus*, to be directed to one William Bragg, commanding him, the said Bragg, to produce the body of one Catharine, or Kate, before said Willis C. Wood, judge of the probate court as aforesaid, *bein* duly sworn by said Willis C. Wood, judge of probate as aforesaid, who had authority to administer such oath, *faulcely* swore that he is the *farther* and proper custodian of Catharine, or Kate, a *calored* girl; the matter so sworn to being material, and the oath of Thaddeous Gibson, in relation to such matter, *bein* wilfully and corruptly *faulce*, against the peace and dignity of the State of Alabama.” Doubtless, the misspelling in this charge is due to the misprision of the clerk who transcribed the record.

The trial in this case took place on the 21st day of September, 1869, and at the trial the accused demurred to the indictment. This demurrer was overruled by the court, and the prisoner excepted to the overruling of his demurrer, and the exception is made a matter of record; thereupon, the defendant pleaded not guilty, and went to trial upon that issue. The jury found the issue against him, and returned into court a verdict of guilty. The court then sentenced the accused to the penitentiary for three years, and gave judgment against him for the cost of the prosecution. From this sentence and judgment the said Gibson appeals to this court, and here assigns for error the overruling of the demurrer to said indictment.

This indictment was found and drawn up under the authority of §§ 3558 and 4139 of the Revised Code of this State, and it is formed on the precedent given in the forms of indictments laid down in the same Code.—Revised Code, §§ 3558, 4139, p. 812, No. 45; *ib.* § 4142.

The matter on which the perjury is assigned grew out of an application for a writ of *habeas corpus*, made to the judge of the probate court of Pike county, for the purpose

of inquiring into the cause of the imprisonment or restraint of "Catharine, or Kate, a colored girl, by William Bragg." This application could only be made by petition signed by the party himself, for whose benefit it was intended, or by some other person on his behalf; and the law requires that it must be verified by the oath of the applicant, to the effect "that the statements therein contained are true to the best of his knowledge, information and belief." And the statute goes on to require that this "petition must state, in substance, the name of the person on whose behalf the application is made; that he is imprisoned or restrained of his liberty in the county; the place of such imprisonment, if known; the name of the officer or person by whom he is so imprisoned, and the cause or pretense of such imprisonment; and if the imprisonment is by virtue of any warrant, writ or other process, a copy thereof must be annexed to the petition, or the petition must allege that a copy thereof has been demanded and refused, or must show some sufficient excuse for the failure to demand a copy."—Revised Code, §§ 4260, 4261, 4262.

Some one of these several particulars are the only statements that could be material on an application for a writ of *habeas corpus*. They are the jurisdictional facts upon which the court acts. If the petition set forth more than these, it contains what is unnecessary; therefore, it is immaterial.—Gould Pl. ch. 3, § 186.

The matter sworn to, which is alleged to be false in the indictment, is, that Gibson "is the father or custodian of Catharine, or Kate, a colored girl." Most clearly this is not in any sense one of the statements required or authorized in a petition for a writ of *habeas corpus*. It was, therefore, wholly irrelevant and immaterial, and may have been stricken out. Perjury cannot be predicated upon it, however false it may be; and if it is stricken out there is nothing left of the oath.—*White v. The State*, 1 Smedes & Marsh. 156. The statute requires that the false oath or affirmation for which one can be convicted of perjury must be wilfully and corruptly made "in regard to any material matter or thing upon any oath authorized by law."—Revised Code, § 3557. And the matter must constitute, to some



degree, or in some manner, "the substance of the proceedings," in which the oath has been taken, and must be so stated in the indictment.—Revised Code, § 4139. This court know that the *formula* of words used in this indictment is no part of the statements required in a writ of *habeas corpus*, and, consequently, it could not be a material part of the oath used in verification of such a petition.—Revised Code, §§ 4161, 4162; 1 Smedes & M. 156, *supra*. The indictment is, therefore, wholly insufficient. And the court below erred in overruling the defendant's demurrer; and for this reason the judgment of conviction must be reversed.

Besides, it will be doubted whether an assignment of perjury, made, as has been one in this indictment, is sufficient as to form, waiving the objection as to substance. It has been decided in the courts of Great Britain, upon a statute very similar to ours, that it is necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant; and a general averment that the defendant falsely swore upon the whole matter of the oath, is not sufficient. The indictment must proceed, by particular averment, to negative that which is false. The whole oath may be set forth in order to make the rest intelligible, though some of the circumstances had a real existence; but the word *falsely* does not import that the whole is false, and when the perjury comes to be assigned, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest. And if the defendant swore only to his *belief*, it will be proper to aver that he "well knew" the contrary of what he swore to be true.—2 Russ. on Cr. 643, (marg.); *Rex v. Perrott*, 2 M. & S. 385, 390, 391, 392; 2 Russ. on Cr. 597; *The State v. Lea*, 3 Ala. 602.

Here the applicant for the writ of *habeas corpus* was only required to swear to the truth of the statement set forth in his petition, "to the best of his knowledge, information and belief."—Revised Code, § 4261. This is the oath that the court must infer was the oath administered to the accused. The indictment, then, ought to have averred that it was false in one or all of these particulars. But



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Williams v. The State.

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the oath alleged in this indictment is not such an one as perjury can be assigned upon it. It is, therefore, unnecessary to remand the cause and keep the appellant for a new trial, as no new trial can be had on this indictment.—Revised Code, § 4316; 1 Smedes & M. 156, *supra*.

The judgment and sentence of the court below is reversed; and the defendant will be discharged from further prosecution in this behalf.

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### WILLIAMS *vs.* THE STATE.

[INDICTMENT FOR BIGAMY.]

1. *Bigamy; lawful wife not competent witness against husband on trial on.*  
In a prosecution for bigamy, the first and true wife can not be admitted to give evidence against her husband.
2. *Same; jurisdiction of offense.*—The local jurisdiction of bigamy is in the county where the defendant married or cohabited with the second wife.
3. *Marriage, contracted through fear of imprisonment; when not void.*—Marriage contracted through fear of imprisonment is not void, when the fear was not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy.
4. *Cohabitation; is evidence of what; what can not affect.*—Cohabitation is evidence of marriage, but it can not make a void marriage valid.

APPEAL from the City Court of Mobile.

Tried before the Hon. C. F. MOULTON.

Williams, the appellant, was indicted at the June term, 1869, of the city court of Mobile, for bigamy; went to trial on the plea of "not guilty," was found guilty, and sentenced to the penitentiary for two years.

The evidence, as shown by the bill of exceptions, was as follows: Sarah Coleman testified, that she was married to defendant in Mobile county, Ala., by McCormick, a justice of the peace, in April, 1869, the defendant at that time be-

ing arrested, on her affidavit, on a charge of bastardy ; that defendant was willing to marry her ; that in May, 1869, she had defendant arrested again, on a charge of bigamy, and that while the defendant was in arrest at the office of the justice of the peace, he voluntarily stated that "he had been married to Pauline Dyer, at Uniontown, but did not state whether Uniontown was in or out of this State, and witness did not know where Uniontown was ; that Pauline Dyer was now living in this State, and was present at the J. P.'s office at the time defendant was arrested for bigamy ; that defendant lived with witness about a month after her marriage, he going home with her immediately after the marriage."

McCormick, the justice of the peace referred to in the testimony of witness, Sarah Coleman, testified, "that upon complaint of said Coleman, in April, 1869, he issued a warrant for the arrest of defendant, on a charge of bastardy, and when defendant was in custody, he read to him a law, requiring defendant to be sent to jail, or give \$1,000 bond, or marry Sarah Coleman ;" that he immediately married the defendant and said Coleman, defendant still being in custody, and immediately after the marriage released him ; that on the second arrest, when defendant was before him in May, 1869, on a charge of bigamy, "defendant admitted that he had married Pauline Dyer, in Clarke county in this State, and that defendant said that he thought he had a right to marry again by going out of the county."

Bates, the constable, after testifying to the arrest of the defendant, as before stated in the testimony of the witnesses, Coleman and McCormick, testified, that defendant, while a prisoner, said he would marry Sarah Coleman, which he did, voluntarily ; that witness went with him to get some money to buy a license ; that he went with defendant to the probate judge's office, and obtained the license ; that on the second arrest, before stated, witness heard defendant, while he was a prisoner, say that he had been married to Pauline Dyer ; that defendant did not say where he married defendant, but only that he married her "up the river, and out of this county."

The prisoner objected to the admissions or confessions, made by him, being received, and moved to exclude them, but his motion and objections were overruled, and defendant excepted.

William Young, Aggie Simpson, and Robert Childs, defendant's witnesses, testified, that they were standing on the side-walk in front of 'squire McCormick's office, and witnessed the marriage between defendant and Sarah Coleman; that defendant refused to marry her; that he said *no* during the performance of the entire ceremony, in answer to all questions put to him by the 'squire in regard to the marriage; that 'squire McCormick went on marrying them any how, not regarding defendant's refusals.

One of the above witnesses testified, that McCormick told the defendant he must marry Sarah Coleman or go to jail; that defendant wanted to get a lawyer, and defendant refused to let him get one.

There was some testimony on the part of these witnesses, that defendant staid with them for two or three days immediately after the marriage, but that after those two or three days they had frequently seen defendant at Sarah Coleman's house. One or two of these witnesses also testified, that the 'squire married defendant and Sarah Coleman "out of a book."

McCormick, on being recalled, testified, that he had not married them "out of a book," but that one hour and a half before the ceremony, he read defendant some law out of a book, as stated in his direct examination; that he did not see defendant's witnesses when he performed the ceremony, and that they were not present.

It was admitted by the State, that there was no place in Mobile county called Uniontown; and by the defendant, that there was and is such a place in the State.

The foregoing was all the evidence.

The solicitor for the State asked the court to charge the jury, "that if they believed that defendant cohabited with Sarah Coleman, and lived with her as his wife after the marriage, that this would amount to a ratification of the marriage, and counteract the want of consent at the time." The court gave the charge, qualified with the remark to the



jury, "that cohabitation, of itself, would not render a void marriage valid ; that the jury might look to the evidence of cohabitation as a circumstance of the case, in determining in their own minds whether the marriage was valid or not, and only to this extent was the charge given." The defendant excepted to the charge as given.

Defendant then asked the following charges :

"1. Upon the evidence, defendant is entitled to an acquittal.

"2. Unless there was evidence that the marriage of defendant with Pauline Dyer was consummated in this county, the jury should acquit.

"3. If the defendant was induced by fraud, or by fear of imprisonment, to consent to the marriage with Sarah Coleman, and did not freely and voluntarily consent to the marriage, the first marriage was void.

"4. In determining whether the marriage with Sarah Coleman was voluntary, they should consider the condition of the accused at the time, as to his being a prisoner at the time, and his fear of being sent to jail."

The court refused each and all of these charges, and the defendant excepted.

POSEY & TOMPKINS, for appellant, assign the following errors : First, in admitting his declarations as to the second marriage ; and, second, in the refusal of the charges asked.

The admission of the confession as to the second marriage, is open to two objections. The law presumes that confessions are involuntary, and this presumption must be overcome by evidence that they were voluntary.—*Bill Miller v. The State*, 40 Ala. 54. There was no such evidence. And declarations are not admissible to prove a second marriage ; the first marriage may be proved by the declarations of defendant, and cohabitation.—*Langtry v. State*, 30 Ala. 536. But the first marriage is only a matter of inducement, and not a crime. And it is a vexed question, even to its admissibility, to prove a first marriage. But the second marriage being the crime, it must be proved by other evidence.

The court erred in refusing the first and second charges.



There was a total failure of evidence as to the *venue*. This is indispensable in all cases.—Constitution, art. 1, § 10; Old Code, § 3514; *Frank v. State*, 40 Ala. 12; *Green v. State*, 41 Ala. 419; Shep. Dig. page 20, and cases cited; Wharton's Amer. Crim. Law, (4 ed.) 2627.

The court erred in refusing the third charge. Such a marriage is utterly void.—2 *Kent's Com.* 76. Also, in refusing the fourth charge. The circumstances of a party at the time of doing an act, are evidence for or against him, to show his motive.

JOSHUA MORSE, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The indictment charged that the defendant, having a wife then living, unlawfully married Pauline Dyer.

If he was guilty of the crime charged, the evidence shows that it was because of his former marriage with Sarah Coleman. She was used as a witness for the State, to prove her marriage with the defendant, as well as his confessions of having married the other. On a trial for bigamy, the first and true wife can not be admitted to give evidence against her husband.—Russell on Crimes, vol. 1, p. 218.

The record professes to set out all the evidence. There was none that the defendant married or cohabited with Pauline Dyer, the second wife, in Mobile county. Therefore, the first charge asked by the defendant, that upon the evidence he was entitled to acquittal, ought to have been given.—Revised Code, §§ 3599, 3941; Constitution, article 1, § 8.

The second charge asked by the defendant was erroneous, because it was immaterial whether the second marriage occurred in Mobile county or not, if there was cohabitation there.

The third charge asked by him was also properly refused, because the fear under which the defendant was supposed to be, was not imposed as an inducement to his marriage with Sarah Coleman, but arose from his arrest and prosecution for bastardy. In other respects it was abstract.

The fourth charge asked and refused, was the same in effect as the third, and objectionable for the same reasons.

The charge asked by the solicitor ought to have been refused, for the reasons given by the court in explanation of it. Cohabitation, though evidence of marriage, can not make a void marriage valid.

The judgment is reversed, and the cause remanded.

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## CARTER vs. THE STATE.

[INDICTMENT FOR DEALING IN OR SELLING TOBACCO WITHOUT LICENSE.]

1. *Dealer in tobacco ; word as used in the revenue law, defined.*—A dealer in tobacco, within the meaning of the revenue law—one that is required to take out a license—is a person whose business, occupation, employment or vocation, is to deal in tobacco; in other words, a tobacconist. It is not every one who sells tobacco that is required to take out a license, but only “dealers in tobacco.”
2. *Same ; what sales of tobacco do not constitute a dealer in tobacco, within the meaning of the revenue law.*—One who is engaged in carrying on a general dry-goods business as a merchant, and only has tobacco in small quantities, and *by way of variety*, in his general dry-goods business, sells it by the plug, is not a “dealer in tobacco,” within the sense and meaning of the revenue law, and is not, therefore, required to take out a license for that business.
3. *Same ; intent of seller, how affects his conviction.*—In such a case, the intent of the party is to be considered, and if in *bad faith*, under cover of his other business, and for the purpose of defrauding the revenue, he sells or trades in tobacco, then he should be convicted; otherwise, not.
4. *Same ; intent, how may be proven, and by whom determined.*—The question of intention may be proven as we prove the intent of a party, where the intent to defraud enters into and is necessary to constitute the offense; and the question of intent should be left to the jury under the evidence, aided by proper instructions from the court.
5. *Charge to jury ; what is improper in such a case.*—A charge in such a case, that “if the jury believe the evidence, they must find the defendant guilty;” is improper; such a charge should never be given, except in plain and palpable cases, where there is no room left for doubt.

APPEAL from the Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

The appellant, George Carter, was indicted at the spring term, 1869, of Barbour circuit court, for "dealing in or selling tobacco, without license, and contrary to law," &c.

The agreed facts of the case were as follows: "The defendant, within the time covered by the indictment, being engaged in carrying on his own, a general dry-goods business, as a merchant in the city of Eufaula, in said county, and only having tobacco in small quantities, whilst his dry-goods business was large, by way of variety, in said dry-goods business, sold tobacco by retail, by the plug, and without license, and in no other way. This was all the evidence."

Upon this evidence, the court, at the request of the State, charged the jury, that "if they believed the evidence, they must find the defendant guilty," to which charge defendant duly excepted.

F. M. WOOD, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

[No briefs came into the Reporter's hands.]

PECK, C. J.—The 105th section of the revenue law enacts, "that it shall be unlawful for any person, firm, company or corporation to engage in, or carry on, any business or profession hereinafter mentioned, without first having paid for and taken out a license therefor, in the manner hereinafter provided.

Section 112 enacts, "that the prices of licenses shall be as follows, to-wit": It then proceeds to state for what business or profession to engage in, or carry on, a license must be taken out, and among these, "dealers in tobacco" are named. It is not every one that sells tobacco that is required to take out a license, but only "dealers in tobacco."

The language of said section 105 is, "shall engage in or carry on any business," &c. We think the common sense interpretation of the words "dealer in tobacco," as



here used, must mean, that it is the business of the party, his usual occupation, employment, vocation. Now, the facts agreed upon, and on which the trial was had, are, that the appellant was a general dry-goods merchant, and only had tobacco, in small quantities, and by way of variety, in his dry-goods business, sold it by the plug.

This being so, was he a dealer in tobacco, in the proper sense of this law? To my apprehension, he was not. To be a dealer in tobacco, is to be a trader, a tobacco merchant.

Was the appellant such a merchant? The evidence says he was a general dry-goods merchant. The sale of tobacco was not the principal business or employment of the appellant; it was not a principal, or even a considerable part of his business. He kept but little tobacco, and sold it in very small quantities—sold it by the plug only; no doubt, as much for the convenience of his customers in his business of a general dry-goods merchant, as for the profits he might derive from it. We think the good or bad faith of the party, should be considered in settling such questions.

If he was selling or trading in tobacco in bad faith, under cover of his other business, for the purpose of defrauding the revenue, then he should be convicted; otherwise, not. It should mainly be considered a question of intention, which may be proved and arrived at, as we arrive at the intent of a party, where the intent to defraud enters into, and is necessary to constitute an offense; and this question of intent should be left to be determined by the jury, under the evidence, in the case, aided by proper instructions from the court. But such a charge as was given in this case, should never be given, except in plain, palpable cases, where there is no room left for doubt.

Let the judgment be reversed, and the cause be remanded for a new trial.

DEPHUE *vs.* THE STATE.

[INDICTMENT FOR MANSLAUGHTER.]

1. *Reputation of physician who examined and testified as to wounds inflicted on deceased ; when admissible evidence on trial for manslaughter.*—On the trial of a defendant for manslaughter, the reputation of the physician who examined the wound which caused death, and who proved its character and effect to the jury, is not a part of the issue, and is irrelevant evidence on such trial, unless the reputation or capacity of the physician is assailed.
2. *Conviction ; when irrelevant evidence will reverse.*—Under a general charge by the court, which rests the conviction on *all* the evidence delivered before the jury, relevant or irrelevant, the conviction will be reversed, unless it appears from the record, that no conviction could be had otherwise than one which was certainly correct.

APPEAL from the City Court of Huntsville.

Tried before Hon. W. H. MOORE.

Joseph DePhue was indicted and tried for manslaughter in the first degree, at the August term, 1869, of the Huntsville city court, found guilty and sentenced to the penitentiary for three years.

The portion of the bill of exceptions, necessary to an understanding of the legal questions decided, is as follows : “The State introduced evidence showing that on the 2d day of July, 1869, in said county, an affray took place between the deceased, Lemuel Hannah, and the defendant, in the course of which the deceased was stabbed by the defendant with a pocket knife, the blade of which was about half or three quarters of an inch in width, and from three and one-half to four inches in length. There was no conflict in the evidence as to the nature or size of the weapon with which the wound was inflicted.

The State then introduced as a witness, one Abner L. Logan, who testified that he was and had been for a number of years a practicing physician ; that as such, he was called to see the deceased, and saw him two or three hours after he was stabbed ; that the wound was inflicted on the

left side, just below the last true rib, and above the first false rib; that it was about one and one-half inches in length, and about three and one-half to four inches in depth, ranging upwards and penetrating the right lung. There was no conflicting evidence as to the description of the wound as here given, (then follows description of medicines, &c., used); that he stitched the wound, or put a stitch in it; that he probed the wound when he first saw deceased, and was satisfied that he would die, and therefore advised deceased's father to remove him to his home, a distance of twelve miles. The wound bled but little when he first saw deceased, and principally internally.

There was evidence showing that the deceased was removed from the place where he was stabbed, to his father's, a distance of twelve miles, over a road rather rough in some places; that he was carried in an open spring wagon, with shucks thrown over the bottom of the bed, and a blanket and quilt spread over it for deceased to lie on; that it was about day-light in the morning of a very warm day in July, when the wagon with deceased started, and that he reached home between nine and ten o'clock in the morning, and lived about forty-eight hours thereafter; that the deceased was in much pain on the way, and frequently changed his position from the bottom of the bed to the driver's seat; that after deceased reached his father's, no physician was called to see him for more than twenty-four hours, though one lived within a mile.

The defendant then introduced as witnesses, J. J. Dement and Ed. Anthony, who testified that they were and had been, for a number of years, practicing physicians; that they had been surgeons in the army, and had skill and experience in the treatment of wounds; that the wound inflicted on the deceased, as described above, was a dangerous wound, though not necessarily fatal, but that if death was the result it should occasion no surprise; that stitching up such a wound entirely was not a good practice, although it might be proper to close it partly; that the removal of the deceased, under the facts above stated, was very bad treatment, and could but result injuriously to the deceased.



These witnesses were not present when Dr. Logan was examined, and did not hear his testimony. Logan's description of the wound was repeated to them by the counsel for defendant, and their opinions were given on the description thus given. They both stated that a physician who probed such a wound in person, and who visited the patient on the succeeding day and carefully examined his symptoms, would be much better prepared to pronounce definitely as to the result of such a wound, than one who had never seen the patient, but heard the wound described ; that an intelligent physician, who had probed such a wound and visited the patient on the succeeding day and carefully examined his symptoms, might often be able to pronounce definitely as to the result.

On cross-examination of the witness, Dr. Dement, the State inquired of him if he knew the witness, Logan, and how long he had known him, and if he was not a practicing physician, and how long he had been such ; and then inquired of said witness what was the reputation of said Logan as a physician. The defendant objected to the introduction of evidence of said Logan's reputation as a physician ; but the court overruled such objection, and defendant excepted.

The witness testified, that Logan bore a good reputation as a physician ; to the admission of which evidence the defendant objected, but the court overruled such objection and admitted the evidence, and defendant excepted.

This was all the evidence relating to the nature of said wound, or its treatment, or the reputation of said Logan. The court charged the jury, at the instance of the State, "that if they believed, from the evidence, that death ensued from the intentional application of unlawful force, though there may have been no specific intention to kill, and though the weapon used is not ordinarily calculated to produce death, the perpetrator is guilty of manslaughter in the first degree, under the statutes of this State, as he would be guilty of manslaughter at common law ;" and defendant excepted.

WALKER & BRICKELL, for appellant.—1. The admission

of the evidence, as to the reputation of the witness, Logan, as a physician, was erroneous.—*Tullis v. Kidd*, 12 Ala. 648 ; 2 Phillips on Ev. C. and Head Notes, 762.

2. The error in the admission of this evidence must work a reversal, unless the record *affirmatively* shows that the defendant could not have been injured by it.—*Thompson v. State*, 20 Ala. 54.

“The admission of irrelevant testimony will reverse, unless the record *clearly* shows that no injury could have resulted. It is not enough that the court is not able to discover injury ; *it must see, and see clearly*, that none could have resulted.”—*Frierson v. Frierson*, 21 Ala. 555.

In *Shields & Walker v. Henry & Mott*, 31 Ala. 53, it is said, “the rule is settled in this State, that if illegal evidence is admitted against the objection of the adversary, nothing less than explicit direction to the jury to disregard such evidence, will cure the error.

3. The rule in this State, is, that error raises the presumption of injury, and unless that presumption *is clearly rebutted* by the record, must reverse the judgment.—See authorities collected ; Shepherd’s Dig. 568, § 83.

The court will, in a criminal case, involving the liberty of the citizen, hesitate to affirm that he has not been prejudiced by the admission of illegal evidence. There was some purpose prejudicial to the accused to be accomplished, or the State would not have offered the evidence, and against his objection pressed its admission. It may have been designed to induce the jury to accord a degree of evidence to Logan’s evidence, to which his manner of testifying would not have entitled it. Without his evidence, it is apparent, a conviction of the appellant could not have been obtained. The evidence objected to may not have been corroboratory of the facts stated by him, but throws his reputation as a physician into the scale, to add weight to his statements. If the evidence had been of his reputation as a man, it would have been inadmissible, unless he had been impeached, and his reputation as a physician is equally irrelevant. Such evidence not only confuses the jury, diverts their attention from the real issues, but sub-

jects them to be influenced by considerations which should not enter into their verdict.

4. The affirmative charge of the court is expressed in the language of the first head note, *McManus v. State*, 36 Ala. 285. We respectfully submit, it is not a correct exposition of the law of this State.

Under our statute, manslaughter is divided into degrees, known as manslaughter in the first degree, and manslaughter in the second degree—the first, punishable by imprisonment in the penitentiary—the other, by fine and imprisonment in the county jail, or a sentence to hard labor for the county. The distinction between the two, is not that stated in *McManus'* case—the distinction between an unlawful accidental killing, and killing by the intentional application of unlawful force—but it is the distinction between an *unlawful intentional killing*, and an *unlawful accidental killing*.

Our Penal Code constitutes an entire system, and among its avowed objects is a mitigation of the severity of the common law, and an adaptation of punishment to the degree of criminality, not attainable under the rigid rules of the common law. Thus, at common law, all murders, however differing in criminality, were subjected to the same punishment. Manslaughter, whether denominated voluntary or involuntary, was visited with punishment of the same character. The Penal Code divides murder into degrees, and the controlling distinction is in the criminality of intent. Wilful, deliberate, premeditated murder, indicative of deeper depravity and darker malignity than a killing maliciously *only*, is punishable, or may be, capitally, while the latter is not. If the "proof be evident, or the presumption great," of the defendant's guilt of murder in the first degree, he is not entitled to bail. However clear may be his guilt of murder in the second degree, he is bailable of right. Such is the law of murder in this State, and we see that the change in the common law, produced by legislation, is an adaptation of punishment to the degree of criminal intent—making the intent with which the act is done, the measure of its criminality. Such being the change produced by legislation, in refer-



ence to murder, if the same legislation extends to and embraces manslaughter, it is but fair to presume, the same change would be produced, and the same legislative intent prevail in reference to that character of homicide. This presumption ripens into a conclusion, if the language employed by the legislature is significant of such an intent. "Manslaughter, by voluntarily depriving a human being of life, is manslaughter in the first degree ; and manslaughter, committed under any other circumstances, is manslaughter in the second degree." If the legislature had intended to observe and preserve the common law distinction, they would have adopted the well known and familiar common law terms—voluntary and involuntary manslaughter, and prescribed the punishment of each. But instead of this, the legislature defines what is manslaughter in the first degree, and defines it as the *voluntary deprivation of life*. Manslaughter committed under any other circumstances, is manslaughter in the second degree—that is, when not *voluntary*. The concurrence of the will with the act is the characteristic of the other. There cannot be a voluntary deprivation of human life, unless the intent to take life exists. This intent may, as matter of law, be predicated from the use of a deadly weapon in a manner, the natural and almost inevitable consequence of which, is death. The facts which will prove such an intent are not a material inquiry in this case, but whether, as matter of law, this intent must not exist, as an essential element of manslaughter in the first degree. "Voluntary" and "involuntary," are words of frequent occurrence in law, and, we submit, are employed to designate and define acts. Thus, we have in our Penal Code a statute providing for the punishment of executive offenses, *voluntarily* permitting an escape, and also a statute punishing them for a *negligent* escape.—Revised Code, §§ 3569, 3570. Now, what is the difference between the two offenses? In the one, the officer *wills, intends* the escape ; and in the other, does not *will, intend it* ; but is so careless in the performance of his duties, that the same result follows, as if his will had produced it. The *voluntary* escape is punishable by imprisonment in the penitentiary—the involuntary escape, by fine only.

The forms of indictment annexed to and forming part of the Code, sustain the view we have presented. The form of indictment for manslaughter in the first degree, is, that "A. B. unlawfully and *intentionally*, but without malice, killed C. D.," &c. For manslaughter in the second degree, is, that "A. B., unlawfully, but without malice, *or the intention to kill*, killed C. D.," &c. Read these forms in connection with § 4112, which provides that the indictment "must state the facts constituting the offense," &c. The indictment does not state the facts constituting the offense, and of these facts, one is, that the killing is intentional, and yet the court charged the jury, that although such is the allegation of the indictment, proof of the allegation is not essential to the defendant's conviction. The form of indictment prescribed is a legislative declaration of the facts necessary to constitute the offense.

The Penal Code is a substantial re-enactment of the section of the Penal Code of 1841, defining manslaughter.—Hay's Dig. 413, §§ 3, 4. In Oliver's case, 17 Ala. 600, in a very able opinion of Dargan, C. J., while the Penal Code of 1841 was of force, the question here presented was discussed and decided. It is said, "when the act is willfully or voluntarily done, without regard to circumstances of provocation, the law declares it manslaughter in the first degree. *It is the will, concurring with or directing the act, that fixes the grade of the crime, and to this test alone can we look to ascertain it.*" The authority of this case should not be regarded as destroyed, by the decision in McManus' case. It is an exposition of the law, more in accord with the spirit of our legislation, and a juster construction of the particular statute than the latter case. An examination of Oliver's case, will show that the doubt expressed in one part of the opinion in McManus' case, whether this question was there presented and decided, is not well founded.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—It is said, that it is the duty of the judge who presides, to confine the evidence to the points in issue,

that the attention of the jury may not be distracted, nor the public time needlessly wasted.—1 Phillips Ev. p. 732, and notes; 4th Amer. Ed. Cow. & Hill. Here the issue was the fact of the manslaughter, of which the defendant below was accused.

It is very evident that the unimpeached reputation of the physician, a witness who examined the wound from the effects of which the deceased is supposed to have died, could not have had any more connection with the act of the killing, than the color or age of the doctor could have had with the same facts. Whether a witness, who is a physician, in such a case as this, has a reputation for skill, or the want of it, in his profession, is no part of the issue, unless the capacity of the witness, in his profession, is impeached.

In this case there was no such impeachment. The reputation, in his profession, of a medical witness, can neither prove nor disprove the facts necessary to establish such a homicide as amounts to the crime of manslaughter. Then, the reputation of Dr. Logan, as a physician, was wholly irrelevant, and it was improperly admitted, when it does not appear that his skill or capacity, in his profession, has been assailed. And such was the case here. A physician is an expert, and as such he may be asked questions which develop his capacity, to form a correct judgment upon the experiences of his profession; but his reputation has nothing to do with this; and it can only be sustained when it is impeached.—1 Burr. Law Dict. 589; *Expert*, Broom's Max. 721, margin; *Tullis v. Kidd*, 12 Ala. 648.

In criminal cases, the life or liberty of the accused is often most deeply concerned. It is the purpose of the law to guard and protect these with the most sedulous assiduity and certainty. Then, in such cases, no looseness of practice should be encouraged, which, by possibility, might lead to an improper conviction. A doubtful conviction is always an improper conviction. It is better, say the old authorities, that an indefinite number of guilty persons should escape, than that one, who is innocent, should be convicted and punished.—Starkie on Ev., Sharswood's Notes, pp. 729, 742; Hale, 290.



The wisdom and justice of this humane maxim is always held most sacred by the wisest and best judges. And, we think, it can be best upheld by adhering most strictly to the rule in criminal cases, which excludes all irrelevant testimony.

It is true that a reversal ought not to be allowed, so long as the record shows that the conviction has been certainly correct, and that the jury, upon whose verdict it is founded, were governed by the legal evidence alone, which tended to support it. The mere fact that the court refuses, upon objection, to exclude a part of the testimony delivered before them, is evidence to the jury that such testimony is of some importance, and tends to prove the guilt of the accused. And it justifies them in so considering it, particularly under a general charge which rests the verdict upon *all* the evidence not excluded from their consideration, as was done in this instance. We could not say that such a practice might not result in an improper conviction. And unless this incontestably appeared, this court could not say that the irrelevant evidence could have had no improper influence upon the verdict.

And although we reverse this cause with hesitancy and reluctance, yet, if such a practice is permitted to stand, it opens the way for a dangerous departure from a primary rule of evidence, which we do not feel willing to encourage or sanction.

The conviction is, therefore, reversed, and the cause remanded for a new trial. And the defendant below, if in custody, will be held in custody until legally discharged.

## WILLIAMS vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER—ILLEGAL ARREST.]

1. *Arrest without a warrant; not forbidden by the constitution.*—An arrest without a warrant, under the provisions of the Revised Code, is not illegal. It is the issue of a warrant, without oath or affirmation, which is forbidden by the constitution, and not the arrest without the warrant.
2. *Policeman; authority of to arrest, co-extensive with the county.*—The authority of a policeman to make an arrest is not confined to the city or town, for which he is appointed, but it is co-extensive with the limits of the county.
3. *Right to resist illegal arrest; what charge as to, may be refused.*—On a trial for an assault with intent to murder, a charge *without explanation*, that the prisoner had a right to resist an unlawful arrest, may be refused. It induces the belief that the illegality of the arrest is an excuse for the deed.
4. *Misdemeanors; murder, voluntarily to kill one accused of, for flying.*—In misdemeanors it will be murder to kill voluntarily the party accused for flying from the arrest, though he cannot be otherwise overtaken, and though there be a warrant to apprehend him.
5. *Felons; when officer cannot kill to arrest.*—Even a felon must not be killed, unless he can not be captured without such severity, of which the jury ought to enquire.
6. *Duty of persons arrested illegally.*—When there is no reasonable cause to apprehend any worse treatment than a legal arrest should subject him to, it is the duty of a person to submit to an illegal arrest, and seek redress from the law.

APPEAL from the City Court of Montgomery.

Tried before Hon. J. D. CUNNINGHAM.

The appellant was convicted on an indictment for an assault with intent to murder, under the following circumstances:

Two policemen, Ed. Williams and another, of the city of Montgomery, under a verbal order from the marshal of the city, arrested the accused just outside of the corporate limits of the city, but within the county of Montgomery, and brought him within the city boundary. They did not

know themselves, and were not informed by any one, of any cause for so doing. He objected to the arrest when made, saying he would die before he would be arrested without a warrant, and continued his resistance until at length he drew a pistol and fired it at Ed. Williams, so close to his head that the powder burned him. The morning after he was confined in the guard-house, he told one of the witnesses that he intended to kill Ed. Williams when he shot at him, and would yet do it. He was roughly handled by the policemen, but it was not stated in what respect, or at what time.

The error alleged is the refusal of the court to give three charges asked for by the appellant's counsel.

1st. The prisoner had a right to resist an unlawful arrest.

2d. When arresting a person without a warrant, the officer must inform him of his authority, and the cause of arrest, except when he is arrested in the actual commission of a public offense, or on pursuit; and if the jury believe, from the testimony, that the officers had no warrant, and that they did not inform the defendant of their authority, and the cause of his arrest, that the arrest was illegal, and the defendant had a right to resist it.

3d. A policeman has no right to arrest without a warrant, outside of the city limits, except for the actual commission of an offense in his presence or on pursuit.

W. F. L. MORGAN, for appellant.

THOS. G. JONES, for Attorney-General, *contra*.

B. F. SAFFOLD, J.—An arrest may be made by any policeman any where within the limits of his county.—Revised Code, § 3683. It may be made by a policeman without a warrant, on any day and at any time, for any public offense committed, or a breach of the peace threatened, in his presence; or when a felony has been committed, though not in his presence, by the person arrested; or where a felony has been committed, and he has reasonable cause to believe that the person arrested committed it; or when he has reasonable cause to believe that the person arrested



has committed a felony, although it may afterwards appear that a felony had not in fact been committed; or on a charge made upon reasonable cause, that the person arrested has committed a felony.—Revised Code, § 3994. A felony, within the meaning of the law of this State, is a public offense, which may be punished by death, or by confinement in the penitentiary.—Revised Code, § 3541.

The second and third charges asked are either in opposition to the statutes referred to, or do not embrace the cases provided for by them, and were properly refused.

The first charge asked requires a more extended examination. The declaration of the prisoner, when about to be arrested, that he would die before he would yield unless the officer had a warrant, was the expression of a prevalent belief that no arrest can be made except upon a warrant. The Federal and State constitutions both provide that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation. As a warrant is the process upon which arrests are usually made, and it can not be issued without oath, the corollary has been drawn that there can be no arrest without a warrant. The popular error on the subject is our excuse for the assertion of the truism that it is the issue of the warrant, without oath or affirmation, which is forbidden, and not the arrest without a warrant.

The arrest in this case was unlawful, because the policeman neither knew, nor was informed, of any reason why it should be made. The charge under consideration was intended, and calculated, to instruct the jury that the defendant had a right to resist, even to killing the officer. An illegal arrest was announced to be a sufficient excuse for an assault with intent to murder the officer making it. The marshal, Scott, testified that the prisoner had committed a robbery. A reasonable belief of this reposing in the breast of the policemen, unknown to the accused, would have made the arrest a legal one. The proposition contended for would transform the attempt upon his life from innocence into felony, without reference to the intention of the perpetrator.

In *Noles v. The State*, (26 Ala. 31,) this court sustained a

charge, that if the prisoner knew and believed the deceased only intended to arrest him, and carry him before the magistrate to answer the complaint to keep the peace, and to prevent this had killed him, with what the law calls malice, he would be guilty of murder, notwithstanding the unlawfulness of the arrest. In *Oliver v. The State*, (17 Ala. 587,) Chief-Justice Dargan said, if it was intended by the decision in *Johnson v. The State*, (12 Ala. 841,) to hold, that life may be taken to prevent a mere trespass upon property, the court would overrule it, without hesitation. All of the authorities concur, that the deliberate killing of another to prevent a mere trespass, whether it could or could not be otherwise prevented, is murder.—*Harrison v. The State*, 24 Ala. 67; *Carroll v. The State*, 23 Ala. 28; *Dill v. The State*, 25 Ala. 15; *Pritchett v. The State*, 22 Ala.; 1 Russ. on Crimes, 220; 2 Bishop's Crim. Law, §§ 641, 642, 643. The right to resist an aggression upon one's person or property is undoubted, but the extent to which the resistance may be carried depends upon the character of the assault or trespass.

Homicide committed for the prevention of any forcible and *atrocious* crime, is justifiable.—3 Black. 180. Though the crime prevented need not be one punishable by death, our law will not suffer, with impunity, every felony to be prevented by death. To kill another in defense of one's life or limb, or to save himself from great bodily harm, or under a reasonable fear of such injuries, is excusable homicide. Besides these, and cases of homicide committed in the execution and for the advancement of public justice, it is unlawful and punishable to take the life of another voluntarily.

In misdemeanors, it will be murder to kill the party accused, for flying from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; but if death was not intended, it may, under some circumstances, amount only to manslaughter. In some instances, however, where the offense may turn out to be a felony, the killing may be justified. Even in cases of felony, the felon must not be killed if the officer can capture him without such severity, by obtaining assistance, or

otherwise, of which the jury ought to inquire.—2 Bishop on Crim. Law, §§ 660, 661, 662. It is also an offense for an officer to strike or otherwise maltreat a prisoner whom he has arrested without some imperious necessity for it.

The citizen may resist an attempt to arrest him, which is simply illegal, to a limited extent, not involving any serious injury to the officer. He may oppose a felonious aggression upon him in the execution of a lawful arrest, even to slaying the officer, when it can not otherwise be prevented. But where he has no reasonable cause to apprehend any worse treatment than a legal arrest should subject him to, it is his duty to submit and seek redress from the law.

The charge was calculated to mislead the jury, and was properly refused. The judgment is affirmed.

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## CRAWFORD vs. THE STATE.

### [INDICTMENT FOR BURGLARY.]

1. *Charge to jury; what improper, when evidence is prima facie only.*—On the trial of an indictment for burglary, a charge by the court, "that if the jury believe the evidence they must find the defendant guilty," is improper, when the only evidence of guilt is *prima facie*, and founded wholly on the fact of the possession, by the accused, of the stolen goods.
2. *Proper practice in such case.*—The fairer practice in such cases is for the court to charge the law and leave the facts wholly to the jury.
3. *Possession of stolen property; explanation of, proper evidence to go to jury.*—One found in possession of a watch alleged to have been taken from a shop by the breaking into and entering the same with intent to steal, may explain his possession, and this explanation may go to the jury, with the proof of possession.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.



The facts are sufficiently stated in the opinion.

W. C. OATES, for prisoner.

JOSHUA MORSE, Attorney-General, *contra*.

[No briefs came into the Reporter's hands.]

PETERS, J.—This is an indictment for burglary against a colored man, found at the spring term of the circuit court of Henry county, in the year 1869. The defendant below was convicted and sentenced to the penitentiary for three years. From this sentence an appeal was taken to this court. In such cases, no assignment of errors, nor joinder in error is necessary, “but the court must render such judgment on the record as the law demands.”—Revised Code, § 4314.

There were two counts in the indictment, but the second was abandoned, and the trial was had only upon the first. The record shows that the charge upon which appellant was tried and convicted in the circuit court, was that he “broke into and entered the shop of Council Bachelor with intent to steal.” To this charge, the defendant pleaded “not guilty.”

The evidence offered by the prosecution was merely *prima facie*. It might all have been true, and yet the accused might not have been guilty, as charged. If such evidence is left wholly unexplained, it has been decided to be sufficient to sustain a conviction. But if there is any opposing testimony of such a character as tends, though in a very slight degree, to diminish the force of a mere *prima facie* showing, then there is room for reasonable doubt; and a charge on such evidence, that if the jury believe the evidence, they must find the accused guilty, is going beyond the province of the court, and an invasion of the duties of the jury. In such a case, it is the fairer practice for the court to charge the law, and leave the effect of the testimony wholly to the consideration of the jury.

In this case, there was no direct proof of the breaking and entering the shop by the accused, except what was inferred from the fact, that the watch alleged to have been

taken, was found in his possession one week after it was missed from the shop. It was proven, that the light by the door was broken, and the indications were, that this had recently been done. All is made to turn upon the possession of the watch—that is, upon one single circumstance, which is but a link in the chain necessary to establish the guilt of the appellant. Without this, there was no proof against him. Evidence of this nature, says Mr. Starkie, is by no means conclusive, and it is stronger or weaker, as the possession is more or less recent.—2 Starkie on Ev. 449. At most, it affords but a slight degree of probability; but it does not necessarily remove all grounds for reasonable doubt; that is, such doubt as grows out of the evidence.

Here, there was some proof in explanation of the possession of the accused. When questioned about his possession, when the watch was first found on him, he explained his possession by declaring, that he had obtained it from another person by a purchase; that though this person was unknown to him, yet the purchase had been made in the presence of “one George Murphy, a colored man, who had gone home.” This might have been a very weak explanation, but it was the right of the accused to explain his possession, and to show that it was honestly obtained; and if this explanation tended to exonerate him from guilt, he was entitled to have it considered by the jury.—*The State v. Merrick*, 19 Maine, 398; *Regina v. Evans*, 2 Cox, C. C. 270; 1 Ld. Cr. Cases, 360, 363; 3 Greenl. Ev. § 32.

The charge of the court has the effect to exclude this explanation from the jury. This was improper.

The conviction and sentence of the court below is, therefore, reversed, and the cause is remanded for a new trial. And the said Alfred Crawford, if sent to the penitentiary, will be returned to the jail of the county of Henry, in the State of Alabama, and there remain in custody until discharged by due course of law.

## McELVAIN vs. MUDD, ADM'R.

[ACTION ON PROMISSORY NOTE FOR THE PURCHASE-MONEY OF SLAVES SOLD IN THIS STATE IN FEBRUARY, 1864.]

1. *Promissory note made in this State in 1864 not invalid for want of stamp; such note should be stamped at any time up to January 1st, 1867.*—A promissory note made in this State, in the year 1864, without an internal revenue stamp, there being then no collection district established here at that time, is not invalid for want of such stamp, but by virtue of section nine, of the internal revenue act of the 13th of July, 1866, such note may have a stamp affixed thereto, by any one having an interest therein, at any time before the 1st day of January, 1867, and after being so stamped, is as valid and admissible in evidence as though it had been stamped at the time it was made.

Whether without being so stamped, it could be used as evidence, Quere.

2. *Promissory note for purchase-money of slaves; sufficient consideration to support, notwithstanding emancipation proclamation, when contract of sale was bona fide, and made between citizens of the rebel States after the proclamation and before the suppression of the rebellion.*—Notwithstanding the proclamation of the president of the United States, of the 1st day of January, 1863, known as the emancipation proclamation, there continued an uncertain contingent interest and property in slaves, which was a sufficient consideration to sustain contracts, made in good faith, in the rebel States, and between citizens of the said States, contracting with each other, in relation to that species of property, between the date of said proclamation, and the suppression of the rebellion, or the end of the war—consequently, a sale of slaves, made in good faith, in this State, between citizens thereof, between those periods, is a valid sale, and a promissory note made to secure the purchase-money, is a valid note, supported by a sufficient consideration, and may be recovered upon in the courts of this State.—(PETERS, J., *dissenting*.)

3. *Ordinance No. 38, of convention of 1867, 3d section of; unconstitutional of.*—The third section of the ordinance, No. 38, of the convention of this State, passed the 6th of December, 1867, entitled "An ordinance concerning the validity of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves," is in conflict with Article I, section 10, part 1, of the constitution of the United States, that declares, "No State shall pass any law impairing the obligation of contracts," and is, therefore, unconstitutional and void.—(PETERS, J., *dissenting*.)

APPEAL from the Circuit Court of Shelby.  
Tried before Hon. JOHN HENDERSON.



This case was submitted on written agreements of the parties, at the June term, 1869, and has been held under advisement until the present term.

The suit originated and was commenced in the circuit court of Jefferson county.

The appellee was the plaintiff in that court, and being the presiding judge of said court, was not competent to try the case, and the appellants not being willing that the case should be tried by an attorney of the court, under section seven hundred and fifty-eight of the Revised Code, and both parties being desirous to have the case tried before a circuit judge of the State, the same was, by the written agreement of the parties, transferred for trial to the circuit court of Shelby county, where a trial was had before a jury, who returned a verdict for the plaintiff, for the sum of seven thousand and fifty-four dollars, and, thereupon, the court rendered judgment in his favor for that sum.

The suit was brought on a promissory note, dated the first day of February, in the year one thousand eight hundred and sixty-four, payable to the plaintiff, as the administrator of the estate of James A. Mudd, deceased, three years from the date thereof, with interest from date, at the rate of eight per cent. per annum. The transcript does not show what pleas, if any, were filed by the defendants.

On the trial, a bill of exceptions was signed and sealed, at the instance of the defendants; so much of which, as is necessary for the purposes of this opinion, states that the plaintiff offered to read the said note as evidence to the jury, to which the defendants objected, because it was not stamped at the time it was executed, and not until the sixth day of December, 1866, when the stamps were affixed and cancelled by the plaintiff himself, without the knowledge of the defendants. The court overruled the objection, and the note was read to the jury; the note being read to the jury, the plaintiff rested his case.

The defendants then proved that said note was given for three negro slaves, sold by plaintiff, as administrator as aforesaid, and purchased by Wallace S. McElvain, one of the defendants, on the said first day of February, 1864.

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The defendants further proved, that said James A. Mudd died intestate, the latter part of July, 1863, in said county of Jefferson, where he resided at the time of his death, and that letters of administration on the estate of said intestate were granted to the said plaintiff on the — day of September, 1863, by the probate court of said county of Jefferson. Upon this, which the bill of exceptions states, was all the evidence, the defendants asked the court to charge the jury, that if they believed the evidence to be true, then they must find for the defendants, which charge the court refused, and the defendants excepted.

An appeal has brought the case to this court, and the appellants have assigned the following errors :

1. The court erred in allowing the note to be read in evidence.

2. The court below erred in the refusal to charge, as asked by the defendants, and in rendering judgment against the defendants.

3. The court erred, as stated in the bill of exceptions.

W. S. MUDD, *pro se*.

ALEX. WHITE, *contra*.

This case was elaborately argued at the bar by the counsel of the parties in this cause, and by other eminent counsel having similar causes before the court. Mr. White, for appellee, filed a printed brief, which has been since withdrawn by him. The opinion of the court, and the dissenting opinion of Justice Peters, present the law and the argument on both sides of the cause; otherwise, notwithstanding the length of the briefs and the opinions, and a want of space, the Reporter would set out the briefs in full.

PECK, C. J.—(After stating the facts as above.)—1. There was no error in permitting the note to be read in evidence to the jury, although it was not stamped at the time it was executed. The internal revenue laws were not in operation in this State at that time, nor had the government of the United States, then, made any provision for their enforcement here, by establishing a collection

district, and by the appointment of internal revenue officers for that purpose. If appointed, they were not here, and could not be here, for the reason that this State was then in the military possession of the rebel government. No stamps were here, nor could they be obtained; and, besides, if they had been here, or could have been obtained, the rebel authorities would not have permitted them to be used. For these reasons it was not then necessary to stamp promissory notes to give them validity, or to authorize them to be used as evidence; and, further, I hold that the note, in this case, would have been admissible, if no stamp had, afterwards, been put upon it. Whether this be so or not, § 9 of the internal revenue act, of the 13th July, 1866, provides that, in all cases where a party has not affixed the stamp required by law, upon any instrument made, signed or issued, at a time when, and at a place where, no collection district was established, it shall be lawful for him, or them, or any person having an interest therein, to affix the proper stamp thereto, prior to the 1st day of January, 1867. That was done in this case, and, consequently, the objection to the admissibility of the note was properly overruled. We will take notice that there was no collection district in this State at the date of this note.

2. The evidence set out in the bill of exceptions, and the charge asked by the defendants, and refused by the court, raise the question as to the validity of the note sued on; that is, whether it has any legal consideration to sustain it, being given for slaves sold by the plaintiff, and bought by the defendants, after the first day of January, 1863—the date of the proclamation of the president of the United States, commonly known as the emancipation proclamation.

3. This question makes it necessary for us to consider two other questions, to-wit: 1st. The question as to the force and legal effect of said proclamation, upon contracts based upon the sale of slaves in this State, after the date of said proclamation, and before the suppression of the rebellion, then prevailing in this and other slave States, against the government of the United States; and, 2d. The



validity and constitutionality of the ordinance of the convention of the people of this State, passed December 6th, 1867, entitled "An ordinance concerning the validity of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves."

As to the first question, I do not propose to go into an elaborate discussion of the abstract right, or morality of the institution of slavery, as it existed in this country before the date of said proclamation. To do so, I am persuaded will accomplish no good purpose, and, most probably, we would come out of such a discussion but little wiser, and, I think, certainly no better, than when we entered upon it.

I shall, therefore, content myself by doing little more than to state, that slavery existed in this country certainly up to the date of said proclamation, and had been uniformly recognized as a lawful institution by all the departments of the federal government, legislative, executive and judicial, from the adoption of the constitution of the United States.

The two acts of congress passed, the one in 1793, and the other in 1850, commonly called the fugitive slave acts, are recognitions, on the part of the legislative and executive departments of the government, of the legal existence of slavery in this country.

It is true, the words "slave" or "slavery," are not named in said acts; but no one who knows anything about the history of these acts, and the reasons why they were passed, is so ignorant as not to know, that their object and purposes were to authorize and enable the owners to recover their fugitive slaves, who should escape from their service, and flee into a State where slavery did not exist.

As to the judicial department of the government, it is only necessary to refer to a single case, in the courts, to show that the highest court in the nation has, in the fullest manner, and on the most mature deliberation, recognized and admitted the legal existence of slavery, in what were known as the slave States, and that slaves were property. I refer to the celebrated case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters Rep. 539. In that case, Prigg, the plaintiff in error, had recaptured a slave named Mar-

garet, a fugitive, from her mistress, and had carried her back to Maryland, the State from which she had escaped, and for this was indicted in the State of Pennsylvania, under an act of the legislature of said State against kidnapping, and was convicted, and the case was taken, by writ of error, to the supreme court of the United States, to test the constitutionality of the statute under which the indictment was found.

In the opinion of the court, it is said, in substance, that it was historically well known, that the object of the clause in the constitution of the United States, relating to persons owing service and labor in one State, escaping into other States, was to secure to the slaveholding States the complete *right and title of ownership in slaves, as property*, in every State of this Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title, say the court, was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it could not be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed.

Its true design was to guard against the doctrine and principles prevailing in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

Again, say the court, the clause in the constitution of the United States, relating to fugitives from labor, manifestly contemplates the existence of a positive, unqualified right, on the part of the owner of a slave, which no State law or regulation can, in any wise, qualify, regulate, control or restrain.

And, again, the court say, we have not the slightest hesitation in holding, that *under and by virtue of the constitution*, the owner of a slave is clothed with the authority, in every State of the Union, to seize and recapture his slave, wherever it can be done without a breach of the peace or illegal violence.

This language, certainly, is clear and positive, and gives

no uncertain sound ; it unmistakably shows that slavery, under the constitution of the United States, was a legal institution, and that slaves lawfully belonged to the owners thereof, *and that they were property* ; and, consequently, could be lawfully bought and sold, and that such contracts were valid, and were supported by a legal consideration. Although the words, "slaves" or "slavery," are not mentioned in said acts, yet, the court do not hesitate to call things by their right name, and declare that they were passed to protect slavery, and to secure to the owners of slaves the full recognition of their right and title to that species of property.

5. In that case, the court, also, further say, the constitutionality of the act of congress, relating to fugitives from labor, has been affirmed by the adjudications of the State tribunals, and by the courts of the United States. If the question of the constitutionality of the law were one of doubtful instruction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive recognitions, would, in the judgment of the court, entitle the question to be considered at rest. Congress, the executive and the judiciary, have, upon various occasions, acted upon this as a sound and reasonable doctrine. The court cite, in support of their decision, the cases of *Stewart v. Laird*, 1 Cranch, 299 ; *Martin v. Hunter*, 1 Wheaton, 304 ; *Cohens v. The Commonwealth of Virginia*, 6 Wheaton, 264.

Besides all this, the said act of 1850 makes it an offense in any one, who shall aid, abet or assist persons, owing labor or service, directly or indirectly, to escape, &c., and any person so offending is liable to a fine, not exceeding one thousand dollars, and, on indictment and conviction, to imprisonment, not exceeding six months.—1 vol. Brightley's Digest, &c., p. 297, § 9. This, certainly, is a conclusive admission on the part of Congress of the existence and lawfulness of slavery.

All this being true, what influence and effect had the proclamation of the president on the institution of slavery in the rebel slaveholding States, and upon the contracts of the citizens of said States, with each other, made in good faith, with reference to that sort of property, between the



date of said proclamation and the final suppression of the rebellion, a period of nearly two years and six months? I say, *contracts made between citizens of the rebel slaveholding States*, because it was unlawful for them and citizens of the United States to enter into any contract with each other, or to have any business, or commercial intercourse whatever, during the continuance of the war.—1 Kent's Com. (mar.) p. 66.

At the time the said proclamation was dated, all the power of the United States could not enforce it, within the territory of the rebel States; nor was it, by the people of said States, admitted to have any legal efficiency whatever, but it was utterly denied that it imposed on them any obligation to obey it—and more, it was never, until the rebellion was suppressed, officially promulgated in said States, nor could it be.

It would seem, therefore, if there were no other reasons, *these people* should not be permitted to resist a performance of their contracts, *made with each other, in good faith, with a full and equal knowledge of all the facts relating to the subject-matter of their contracts, and each party assuming and taking upon himself all the risks attendant upon them.* Risking contracts are not unknown to the law, and, when honestly made, are enforced like other contracts.

We are persuaded, that the president, by whom this proclamation was issued, did not hold, or believe, that from its date it did or could, by its own vigor, so utterly abolish the institution of slavery *in the said rebel States, and all property in the slaves themselves*, in such manner as to render and make void all contracts made in relation to that kind of property. The language used by him in the preamble, and in the proclamation itself, clearly sustains this view of it.

The preamble recites, that, "Whereas, on the twenty-second day of September, in the year of our Lord, one thousand eight hundred and sixty-two, a proclamation was issued by the president of the United States, containing, among other things, the following, to-wit: That, on the first day of January, one thousand eight hundred and sixty-three, all persons held as slaves in any State, or designated

part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their *actual freedom*."

This is an admission that, notwithstanding said proclamation, the slaves, the subjects of it, were not then, by the mere force of the same, *actually free*; and it is, also, a declaration that, in the event they made any efforts to *obtain their freedom*, the United States would do no act or acts to repress such efforts. In the body of the proclamation it is declared, that it is made by virtue of the powers in the president vested, *as commander-in-chief of the army and navy of the United States*, in time of actual armed rebellion against the authority of the government of the United States, and as a fit and necessary *war measure*, for the suppressing of said rebellion. Consequently, if the rebellion should not be suppressed, the proclamation would not, and could not accomplish its purpose; and, therefore, until the rebellion was overcome, slavery would continue *in fact to exist*.

The proclamation was a mere war measure, so admitted by its own language, and, like any other war measure, worthless unless, and until, it could be carried into effect; therefore, it had no potential operation or force, *on the people of the rebel States*, until the rebellion was conquered. Then, and not till then, did or could the slaves become free by force of the said proclamation; and from that time, and not before, contracts for their sale or hire became invalid, for the want of any legal consideration to support them.

Being a mere war measure, the president, if it failed to accomplish the object intended and desired, by the same powers and authority by which he had issued it, by his powers and authority as commander-in-chief, might, at least, before it was executed and during the continuance of the war, *and while the same military necessity existed*, and before the slaves, the intended beneficiaries of it, had accepted of it

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and become parties to it, and had acquired and entered upon the enjoyment of its benefits, in his wisdom and discretion, if he had believed it best, withdrawn the proclamation altogether, and have issued any other proclamation or adopted any other war measure that he might have thought would better accomplish the end desired—that is, the suppression of the rebellion, and the preservation of the Union and government of the United States.

Who can reasonably doubt, but that, at the conference at Fortress Monroe, the president might not *then* have withdrawn the said proclamation, if he had thought proper to do so, upon the rebel government and people stipulating to abandon their resistance to the government and authority of the Union, and renewing their allegiance to the constitution and government of the United States?

If this had been done, would not slavery have been continued, under the same guarantees and protection that it had before the rebellion began? For myself, I can not doubt but that such would have been the effect; and that slavery, now, if such a settlement had taken place, would have had a legal existence in all the then slaveholding States.

In the case of *Morgan, Adm'r, v. Nelson, Adm'r*, decided at the last June term of this court, it is held, that emancipation was a fact that would be judicially noticed by the courts, without proof; that it was a national act, and must be referred to some particular date; that it was founded upon the emancipation proclamation of the president of the United States, of the first day of January, 1863, and, consequently, that day, *by the doctrine of relation*, is held to be the day on which emancipation took place. This doctrine of relation, however, is never permitted to be used or applied, *in hinderance, but only in furtherance of justice*.

It must not, however, be forgotten or overlooked, in this connection, that the president's proclamation was issued when a formidable rebellion was prevailing in the States, in which the institution of slavery chiefly existed, and, therefore, it was not and could not then be executed; and,



whether it could be carried into effect, depended upon the suppression of that rebellion.

A mighty struggle was then going on to overcome that rebellion, which continued until the rebel authorities were overthrown and their armies captured, in the early part of the year 1865, more than two years after the date of that proclamation; then emancipation became an accomplished thing, and slavery ceased to have any existence, *either in law or in fact*, within the territory covered by said proclamation.

But during the period of that struggle, notwithstanding the proclamation, there continued, *in fact, an uncertain, indefinite and indeterminate value* in the institution of slavery, and property in the unfortunate subjects of it, the slaves themselves.

We see, therefore, that this proclamation, though positive in its language, depended upon a contingency—an uncertain event—the real end of which no one could then foresee, and no one could then know whether its purpose would ever be realized.

This uncertain and indeterminate value, or property, in slaves, where parties acted in good faith, formed a legal basis and consideration for valid contracts; in other words, this uncertain and contingent interest, or property in slaves, might be lawfully bought and sold.

An uncertain interest, a contingent remainder, a mere expectancy, even, is the legitimate subject of bargain and sale.—2 Story's Eq. §§ 1040-1055.

Such an interest is of no present value; that is, is not capable of present possession and enjoyment. Not so the interest that remained in slaves, notwithstanding the president's proclamation; that was an interest, in present possession and enjoyment, liable only to be defeated on the suppression of the rebellion. If that was never suppressed, then the institution of slavery, and property in slaves, would remain as though the proclamation had never been made.

This proclamation may have had, to a greater or less extent, an effect upon the value of this kind of property, but we know, historically, it continued nevertheless to be

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freely bought and sold *by the people of the rebel States*, and was treated as property by the rebel government; a government that had military possession of the country, and a government the people were compelled to obey, whether they would or not. This kind of property was also administered by executors and administrators of deceased parties, and sold and distributed as other property belonging to estates was sold and distributed; and was also held to be property by the rebel courts, and was levied upon and sold, under their judicial process, in the same manner as other property. For these reasons, we see no better, no more rational way of considering and disposing of controversies growing out of contracts in relation to this sort of property, than to treat them as the parties themselves treated them when they were made, and to hold them, where good faith was observed, as valid contracts.

These views, I think, derive much support from the case of *Morgan, Adm'r, v. Nelson, Adm'r, supra*.

In that case, Morgan, as administrator, *before the date* of the emancipation proclamation, had received slaves belonging to his intestate's estate, and *after the said proclamation was issued*, either used the said slaves himself or hired them out, and had received their wages. One of the questions in the case was, whether he was to be charged for the use or hire of the said slaves, after the date of said proclamation. We held he was to be so charged. Judge PETERS, delivering the opinion of the court, (I quote from his head-notes,) says, speaking of emancipation, "It was effected by the nation, and not by the States; the only national act that decreed it was the proclamation of the president, of the 1st January, 1863; the struggle afterwards was merely an effort to prevent the proclamation from being carried into effect. The total failure of this struggle, *refers emancipation back to that date*. But, notwithstanding, the event of emancipation is fixed by the act of the nation, at the first day of January, 1863; yet, if an administrator used the slaves of his intestate for his own profit, after that date, he should be charged with such profits *up to the date* of the discharge of the slaves from his control by the *result of the war*."

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This is unquestionably right. It is common doctrine, that a trustee is not permitted to profit by his use of the trust property, but is bound to account for any profits he may make, by such use, to the beneficiaries.

But in that case, if the proclamation, by its own vigor, so utterly and absolutely abolished slavery from its date, that no interest or property remained in them whatever from that date, then it follows, *that from that date the slaves not only ceased to be trust property, but also ceased to be property at all*; consequently, it would seem, upon every principle of equity, that the profits derived from the use of the slaves did not belong to the estate, but should have gone to those who earned them. The plain inference from all this is, that, notwithstanding the proclamation, there continued an uncertain, contingent interest and property in slaves until the proclamation became effectual, by the suppression of the rebellion; and, therefore, the administrator was rightly required to account for the use of the slaves, from the date of the proclamation until they were discharged from his control, by the successful results of the war.

We remain satisfied with the decision in that case, and are persuaded, rightly understood, it was decided upon correct principles.

The principles settled by the supreme court of the United States, in the recent case of *Thorington v. Smith, et al.*, that went to that court, on error from the district court of the United States for the middle district of Alabama, it seems to me, inferentially, sustain the opinion in this case. It is there held, that a contract made during the rebellion, *between parties residing within the so-called Confederate States*, which, by the understanding of the parties, was to be satisfied in Confederate notes, could be enforced in the courts of the United States—that Confederate notes, although issued by an illegal hostile government, yet, such notes having, while the war lasted, been used as money in nearly all the business transactions of many millions of people, and having had a *certain contingent value*, therefore, they should be regarded as a currency, imposed on the commu-



nity by irresistible force, and should be treated in courts of law in the same light, as if they had been issued by a foreign government, temporarily occupying a part of the territory of the United States; that contracts stipulating for payment in Confederate notes could not be regarded as made in aid of the rebellion, but are transactions, made in the ordinary cases of civil society, and though they may have, incidentally and remotely, promoted the ends of the unlawful government, are without blame, except when proved to have been entered into with the actual intent to further the rebellion.

These views, it seems to me, are persuasive of the correctness of the opinion in holding that slaves, notwithstanding the proclamation, nevertheless, until the rebellion was suppressed, and the said proclamation became effectual to control the people of the rebel States, continued during the period between the date of the proclamation, and the end of the war, to have an *uncertain and contingent value in said rebel States*, and that contracts made *between citizens of said States*, in reference to that species of property, are sustained by a lawful and sufficient consideration.

A majority of the court, therefore, hold that the note upon which the action is founded, when made, was a valid contract, and sustained by a legal consideration, and that the plaintiff in the court below was entitled to recover upon it, unless this right to recover was defeated by the third section of the ordinance of the convention of 1867, above referred to.

3. We now proceed to consider the question raised in this case, upon said ordinance. The third section thereof, is in the words and figures following, to-wit: "And be it further ordained, and it is hereby declared, that there is a failure of consideration, and it shall be so held by the courts of the State, upon all deeds or bills of sale given for slaves, with covenants of warranty for title or soundness, or both, and upon all bills, bonds, notes, or other evidences of debt, given for or in consideration of slaves, which are now outstanding and unpaid, *and no action shall be maintained thereon*, and that all judgments and decrees rendered in any of the courts of this State, since the 11th

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day of January, 1861, upon any deed or bill of sale, or upon any bond, bill, note or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defense in all said suits; *Provided*, That settlements and compromises of such transactions, made by the parties thereto, shall be respected."

It is certain, if this section can be upheld, then the note upon which the action is brought, and all like contracts therein named, contracts "based upon the sale and purchase of slaves," are worthless. We have already declared the first section of this ordinance unconstitutional, because it impaired the obligation of contracts.—*Roach, Adm'r, v. Gunter*, at the last June term.

We think this third section must share the same fate. The constitution of the United States declares that, "no State shall pass any law impairing the obligation of contracts"—Part 1, section 10, article 1. This ordinance can claim no exemption from the force and effect of this constitutional provision, because it is the act of a convention of the people of the State, and not a law passed in the ordinary course of legislation by the general assembly thereof; for the reason it is the State itself, in its corporate character, that is prohibited from passing such a law. If this third section formed a part of the constitution, it would not save it from the operation of this constitutional prohibition. Part 2, article 6, of the constitution of the United States declares that, "this constitution and the laws of the United States, which shall be made in pursuance thereof, &c., shall be the supreme law of the land, and the judges in every State shall be bound thereby; any thing in the constitution or laws of any State, to the contrary notwithstanding." We have no hesitation in declaring that this third section of said ordinance impairs the obligation of contracts, and is, therefore, unconstitutional and void.

It does more in legal effect, it utterly abrogates, nullifies and makes void all the kind of contracts named in it.

It is terribly sweeping in its character, and embraces contracts and notes for the sale of slaves, even before the date of the ordinance of secession, as well as those made

after the date of the proclamation of the president. We, therefore, hold that said third section is void, both as to contracts made before the date of said proclamation, and those made in good faith, between the date thereof, and the suppression of the rebellion. We refer to the following, as a few of the many cases on this subject, to be found in the reports of the States, and of the courts of the United States.—*Green v. Biddle*, 8 Wheaton, 1; *Gilpeke v. Dubyne*, 1 Wallace, 175; *Havemeyer v. Iowa County*, 3 Wallace, 294; *Thompson v. Lee County*, 3 Wallace, 327; *Johnson v. Bond*, Hempstead's Rep. 533; *Webster v. Cooper*, 14 Howard, 488; *Bronson v. Kenzie*, 1 Howard, 316; *Lewis v. Broadwell*, 3 McLean's Rep. 568; *Arrowsmith v. Burlengim*, 4 McLean, 490; *McCracken v. Haywood*, 2 Howard, 600; *Howard v. Bugbee*, 24 Howard, 461; *Curren v. Arkansas*, 15 Howard, 304; *Tennessee & Coosa R. R. Co. v. Moore*, 36 Ala. 373.

No question is made in this case as to the sum the plaintiff was entitled to recover. There is no evidence in the bill of exceptions that shows, by the understanding of the parties, the note was to be paid in Confederate money, or that the slaves bought were not, at the date of the note, in the contemplation of the parties, worth the sum agreed to be paid in the legal currency of the United States.

The judgment of the court below, is, therefore, affirmed, with five per cent. damages—see Ordinance, No. 35, of 1867; Pamphlet Acts, 1868, p. 182—and the costs of this court and of the court below.

B. F. SAFFOLD, J.—I concur in the opinion of the chief justice. His conclusion follows inevitably his argument. Slavery in Alabama ceased, in fact, in the spring of 1865, through the military force of the United States government. War is yet a legislative power, and wages of battle is still a mode of trial. If it should ever become important to determine the precise time when the abolition of slavery was effected by law in this State, I am satisfied it will be referred to the date of the adoption of the 13th amendment to the federal constitution.

PETERS, J. (dissenting.)—1. I do not feel able to agree



with the majority of the court in the judgment just announced, nor in the reasoning upon which it is based.

2. In the view I take of this case, the material facts are these: William S. Mudd, as the administrator of the estate of James A. Mudd, deceased, instituted suit in the circuit court of Jefferson county, in this State, against Wallace S. McElvain and others, on the 25th day of February, 1867. This suit was founded upon a promissory note for the payment to said William S. Mudd, as administrator aforesaid, of the sum of five thousand, three hundred dollars, three years after the date of said note, which bore date the first day of February, 1864, with interest thereon from the date, at eight per cent. per annum. This note was made in this State, and it was given for the purchase-money of *three* persons sold as negro slaves in this State, in said year 1864. The cause was removed, by agreement of the parties, from the county of Jefferson to the county of Shelby, in this State, and there tried in March, 1868. The judgment was for \$7.054, besides costs of suit.

3. On the trial, the defense relied on was the invalidity of the note, as a contract for the sale of slaves made since the first day of January, 1863. This defense renders it necessary to consider the effect of Ordinance No. 38 of the convention of 1867, and the effect of the emancipation of the slaves in this State upon such a contract. The ordinance referred to is entitled "An ordinance concerning the value of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves," passed December 6th, 1867.—Pamph. Acts, 1868, pp. 185, 186. In treating of this ordinance, I will refer, incidentally, also to the validity of contracts for "Confederate money," though that question is not involved in this case, as it is now presented to this court.

4. After the passage of the ordinance of secession, on the 11th day of January, 1861, the new political organization which was formed in the State of Alabama, was unlawful and revolutionary towards the government of the United States. It had no constitutional connection with this latter government. It did not form the government of a State of the Union, though it was within the boundaries

of the United States and upon the territory of the State of Alabama. Such a political organization has no rights under the constitution of the United States.—Tiffany on Gov. pp. 314, 315, 316, 317; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Hepburn et al. v. Ellzy*, 2 Cr. 452; *Owings v. Speed*, 5 Wheaton 420; *Herman v. Phelan*, 14 Howard, 79. This government then being illegal, every department of it was also illegal. The whole being bad, the parts were bad also. *Quod majori non valet, nec valet in minori*.—Coke, (Litt.) 262. It therefore follows, that its legislative acts, its judicial proceedings, and its executive proceedings, were all invalid, unless confirmed by the rightful authority—5 How. 343; 7 How. 1; 7 Wall, 700.

5. If the reverse of this were true, then secession and the proceedings under it were rightful and legal. But this has been denied by every branch of the Federal government, and by this State, since its restoration, in every department of its government.—Ordinance No. 13; Revised Code, p. 55; Ordinance No. 16; Pamp. Acts, 1868, p. 167; Proclamation of Gov. Patton, Feb. 13, 1866; *Hall v. Hall*, at June term, 1869; *Chisholm v. Coleman*, at January term, 1869.

6. This unlawful and revolutionary government was overturned in the year 1865, at least as early as May of that year. During the interregnum, from the 11th day of January, 1861, until the insurgent organization was destroyed, there was no legal government in this State; and whilst this period lasted, the customary seats of administration being in possession of the rebel authorities, no steps could be taken by the rightful government, to prevent an illegal use of the legislative, judicial and executive functions of the government administered in this estate, until this illegal government should be suppressed. This was, then, a period of time, during which the powers of the State, as a member of the Union, were suspended, though they were not destroyed. Thus, the legislative power of the rightful government was deprived of an opportunity to discharge its legitimate functions. Under such circumstances, many things might have been done, under pretense of authority, which might not have been permitted under the rightful

government; or which the rightful government might have refused to allow, had the power to act remained within its control. And, undoubtedly, what the rightful government could have forbidden, it may now, on its restoration, refuse to sanction. There is no doubt, that the rightful government could have emancipated the slaves, and could have refused to permit the making of contracts for the sale of slaves within its own borders—*Jones v. Slaughter*, 15 Pet. 449; *Roman v. Reynolds*, 5 How. 134; Cobb on Slavery, (Historical Sketch,) p. clxxi, (171,) *et seq.*; *McCutchen v. Marshall*, 8 Pet. 220; *Butler v. Hopper*, 1 W. C. C. 499; 2 Kent, 252, and notes. And upon a like principle, the rightful government might have refused to permit contracts for the circulation of the bonds and treasury-notes of the so-called Confederate States; or it might have refused to allow a hostile government to set up its courts within its borders; or to give validity to the judgments and sentences of such courts. These are powers that belong to all the States. They are rights which are inherent in that sovereignty, which is an essential element of State authority.—*Craig v. Missouri*, 4 Pet. 410. 462, 463, 464; 3 Dal. 6.

7. Then, most clearly what the State may have refused, it may deny to an usurper, who has illegally displaced its authority. The rightful State is not to be deprived of the power to regulate its own policy and its own domestic affairs, by an illegal authority. If it can not act by way of prevention, in the first instance, it may act by way of cure, in the end. The rightful authority is not to be paralyzed and defeated by the assumed authority of a mere attempt at revolution. At least, the courts in this country, can not, without the aid of legislation, set up and validify the proceedings of a revolutionary government.—5 Howard, 343; 7 How. 1.

8. It is to be presumed, that the rightful authority of the State would have acted within its rightful sphere. With it, the policy of the nation, *for its preservation*, would have been the policy of the State. This was the case of all the loyal States, and of West Virginia and Missouri, which were slaveholding States, that remained loyal to the Nation. This is what all the States have done that have returned



in good faith to their obedience to the national constitution. Then contracts for the circulation of Confederate bonds and treasury-notes would not have been permitted or sanctioned by the rightful government; because they were opposed to the public policy of the nation, and were void.—*Kennett v. Chambers*, 4 How. 38; Benj. on Sales, 384. And slavery would have been abandoned when the policy of the national government required it, *for its own peace and safety*. For in a national sense as well as in an individual sense, *salus populi suprema lex*. Therefore, the power of the rightful State to judge of this, and to act as it may think best, is not to be controlled by the interposition of an illegal, insurgent power. Else the loyal sovereign will of the State may be illegally defeated.—1 Story on Const. § 208; *Chisholm's Ex'r v. Georgia*, 2 Dal. 419, 471.

9. What then the State could have forbidden, but was prevented from doing, in consequence of the illegal suspension of its authority by the insurrection, it may prevent from being consummated, as soon as its authority is restored. Otherwise, the irregular and insurgent government must become paramount to that which is legal and regular, and the legal sovereign authority may be set at naught. This would be absurd, and invite to revolution. No government can control its own affairs under such a system, if the rightful authority is thus subject to be displaced and defeated by insurrection or rebellion. In order to prevent this defeat of the rightful legislative will, the rightful government must retain within itself the power, upon its restoration, to deny validity to all the acts of the rebel organization, by whatever name it may be called. And this power must not only extend over the period covered by the supremacy of the rebellion, but it must also apply to the whole period from the suspension of the functions of the rightful government until its permanent restoration. After the full and perfect restoration of the government, and not till then, is the State subjected to the control of the rightful authority, which represents the *loyal sovereign will*, and which is the *supreme and governing* power of the State, under the limitations of the constitution of the Union. Reconstruction Acts of Congress; Preamble of the Act of

March 2, 1867 ; Act of July 19, 1867, § 1 ; President Johnson's Proclamation, June 21, 1865, clause numbered "*first* ;" Gov. Parson's Proclamation, July 20, 1865, clause numbered "4 ;" Revised Code, pp. 73, 76.

10. Tried by these principles, it seems to me beyond all question, that the ordinances numbered 38 and 39 of the convention of 1867, so far as they relate to the judgments therein mentioned, are free from constitutional objection, and they are to this extent binding on the courts until repealed. The judgments of the rebel courts condemned by the ordinances above referred to are void, because they are the acts of a void judicial authority.—Lofft. 453. This is what the convention declared, and this it had the authority to do. If not, then these acts of an illegal and void power would be beyond the rightful legislative control. They would defy the control of the rightful sovereign will for their correction, should it be discovered that they were wrong. Such an example of the ratification and approval of the authority of a mere insurrection is not to be found anywhere supported by any declaration of the congress, or the judgments of the highest courts of the nation.

11. The legislative authority of the State is the sole and supreme law-making power, for the control of its domestic affairs ; and where this authority is not limited by constitutional restrictions, it is practically absolute. The *whole* law-making power is vested in the legislature, and whatever laws are needful to be enacted must come from this authority.—Cooley on Const. Limit. pp. 167, 168, 169, and notes ; Const. Ala. art. 4, § 1. The constitution was not made to protect the judgments of rebel courts, or the judgments of illegal governments. And where they are not so protected, they are at the mercy of the legislative power of the rightful authority.

12. But besides this, the second section of ordinance No. 38 is in these words : "*Be it further enacted*, That all bills, bonds, notes, or evidences of debt, outstanding and unpaid, given for or in consideration of bonds or treasury-notes of the so-called Confederate States, or notes or bonds of this State (to be) paid and redeemable in bonds or notes of the Confederate States, are hereby declared null and

void, and no action shall be maintained thereon in the courts of this State.”—Pamph. Acts, 1868, p. 186. It is known to the court, as a part of the history of the late war, that these treasury-notes and bonds of the said Confederate States were issued and circulated in aid and support of the rebellion, and that they furnished the means by which the insurgent soldiery were chiefly, if not wholly paid, and supplied them with the means of subsistence. It is also known, that, varying in amount, denomination, date, number and signature, the said treasury-notes were in the following words: “Two years after the ratification of a treaty of peace between the Confederate States and the United States of America, the Confederate States of America will pay twenty dollars to the holder, on demand. A. No. 36,-349. Richmond, February 17, 1864. S. Selot, *for the register*. S. M. Cants, *for the treasurer*.” It is doubtful whether these notes will ever become due, and consequently they are utterly worthless.

13. It is also known, that these notes and bonds came into being as instruments of the rebellion; and were issued mainly for the purpose of paying the expenses of the insurgent government, and not for the purposes of legitimate commerce. Such a purpose was in contravention of the policy of the government of the United States. Their issuance and circulation was therefore illegal. All contracts to aid an illegal purpose are tainted with its illegality—1 Par. Contr. p. 456. They were therefore void. This the State, by law, could declare, without any violation of the constitution of the United States.—*Davidson v. Lanier*, 4 Wall, 447; *Brown v. Tarkinton*, 3 Wall, 377; *Nordlington v. Vaiden*, 2 Amer. Law Rev. 188; *Bank of Tenn. v. Union Bank*, 2 Amer. L. R. 346; *Ex parte Miller*, 16 Amer. L. R. 371; *Tufts v. Tufts*, 3 Woodb. & Minot, 457.

14. The ordinance in reference to the sale of slaves, is one of more difficulty than that in relation to judgments; because it involves the consideration of the constitutional provision for the protection of contracts.

15. It cannot now be denied that slavery is abolished in this State, and that the slaves are all made free. Nor will



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it be denied that emancipation has been effected by the act of the nation. This is the repeated admission of this court; and under its present organization, it is not to be presumed that the correctness of this admission will be questioned. There may be some difference of opinion in regard to the manner in which emancipation has been brought about, and the precise date at which it took effect, but none that it has been accomplished.—*Miller v. The State*, 40 Ala. 54; *Nelson, Adm'r, v. Morgan, Adm'r*, June term, 1869.

16. The first great national act that assailed the institution of slavery, as a whole, in this State, was the proclamation of President Lincoln, issued on the first day of January, 1863. This proclaimed the absolute and unconditional emancipation of the slaves in certain portions of the United States, of which the State of Alabama was a part. The government was then in the midst of a fierce struggle for its preservation, and this great measure was deemed *necessary* for its success in that struggle. After that date, it became the *policy* of the nation to enforce this proclamation; and it was persisted in until it was finally successful. It may be said, that such a measure was founded in revolution and force; but this does not destroy its rightfulness nor its effect. The nation achieved, in the end, what it had proclaimed. In such cases, it is a rule almost without exception, that the effect of such measures must be referred to the beginning, or to the first proclamation of the purpose intended to be accomplished. The American colonies proclaimed themselves free and independent States, on the 4th day of July, 1776. They did not, however, achieve their independence until the end of a long and bloody war, which lasted for above seven years, until September 3d, 1783—Dec. of Ind., Revised Code, pp. 1, 3; Wilson's Amer. Hist. 358, 408. Yet, in law, the effect of the proclamation of independence is referred to the fourth day of July, 1776.—*McIlvaine v. Cox*, 4 Cranch, 209. The same is the case with the construction of treaties. Though they are not completed until ratified by the consent of the Senate, and would be invalid without that ratification, (Const. of U. S. art. 2, § 2, cl. 2,) yet in their operation they are held, in

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law, to take effect from their date.—*United States v. Regnes*, 9 How. 127 ; *Davis v. Parish of Concordia*, 9 Howard, 280 ; *Montault v. U. States*, 12 How. 47 ; *U. States v. Daulerive*, 10 How. 609.

17. Referring to emancipation, Chief-Justice Chase, delivering the opinion of the court, in the case of *Texas v. White*, says : "Slaves in the insurgent States, with certain local exceptions, had been declared free by the proclamation of emancipation ; and whatever questions might be made as to the effect of that act, under the constitution, it was clear from the beginning that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the national forces obtained control, the slaves became freemen. Support to the acts of congress and the proclamation concerning slaves, was made a condition of amnesty by President Lincoln, in December, 1863, and by President Johnson, in May, 1865.—13 Stat. at large, 737, 758. And emancipation was *confirmed*, rather than ordained, in the insurgent States by the amendment of the constitution prohibiting slavery throughout the Union, which was proposed by congress in February, 1865, and ratified before the close of the following autumn, by the requisite three-fourths of the States." 13 Stat. at large, 774, 775 ; 7 Wall. 728.

18. But besides this *confirmation* of the proclamation of emancipation above referred to, it is a well known historical fact, that before the issuance of that instrument many of the slaves of this State had become entitled to freedom under the operation of the fourth section of the act of congress of August 1st, 1861.

19. The proclamation was but the culmination of the policy of the several acts of congress which had preceded it, and which had the same tendency and purpose. By the act of August 1, 1861, all slaves who were used in any military or naval service against the government of the United States were made free.—12 Stat. at large, 319. So were the slaves of all persons engaged in the rebellion. And fugitives from labor were not to be returned.—Act of congress, July 17, 1862, §§ 9, 10 ; 12 Statutes at large, 591. President Lincoln's amnesty proclamation of December 8,

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1863, required the parties seeking to avail themselves of its benefits to swear, "to abide by and faithfully support" "all the acts of congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, or held void by congress or by decision of the supreme court;" and "*all proclamations of the president made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the supreme court.*"—App. to Acts of Congress of 1863–4, pp. 6, 7, 8. The amnesty proclamation of President Johnson, which bears date May 29th, 1865, was to a similar effect, and contains a like condition. The latter proclamation required all persons seeking amnesty and pardon under it, to swear as before, to "abide by and faithfully support all *laws and proclamations which have been made during the existing rebellion, with reference to the emancipation of slaves.*" How could this be done, unless the proclamation was accepted as of its date, and the acts of congress above cited in the like manner? Most certainly, the oath of amnesty required this.

20. It is known to the court as an historical fact, that a very large majority of the white voters of the State have taken the benefit of the amnesty thus offered, and have complied with its terms. This was the most solemn confirmation and ratification of the proclamation of the first day of January, 1863; and this could only be done in the language of the proclamation itself. Thus, the emancipation of the slaves in this State was fixed as of the date of that important State paper, and we are in a certain measure estopped to deny it. This document declares, that "all persons held as slaves," in the State of Alabama, "are and henceforth shall be free."—Public Laws of the U. States, 1862–3, App. p. 3. This important system of measures from the year 1861 to the year 1865, shows that it was the purpose and policy of the government of the United States to abolish slavery in the insurgent States, and that this purpose was fixed to take effect on the first day of January, 1863, and that it was so *accepted and confirmed*, as of that date, by all persons who took the benefit of the amnesty



above referred to, which constituted a large majority of the white male people of the State.

20. Then, all sales of slaves which occurred after that date were illegal, and this the ordinance properly declares. The sales were, moreover, against the public policy of the nation, and for that reason also they were illegal and void. *Tool Co. v. Norris*, 2 Wall. 45; *Kennett v. Chambers*, 14 How. 38; *Nelson v. Morgan*, January term, 1869.

21. The precise date at which emancipation took effect in this State being thus settled, I pass on to consider the influence of emancipation upon all agreements for the sale of slaves in this State, irrespective of the time at which they may have been contracted.

22. Slaves were held in their unhappy condition by a regulation founded in force on the one hand, and weakness on the other. There was no positive statute of the State which *ordained* slavery. It was permitted and protected, but it was not *created* by legislative enactment. It was never a creature of the common law. It existed only as a local institution. The great founders of the government shunned the use of the word *slave* in the constitution, and the eloquent proclamation of independence openly defied the truth of the basis on which slavery was founded. Slavery violated a great natural law; that is, that man is of necessity, for his own support, entitled to the proceeds of his own labor. It is said, that to seize the property of another is intrinsically immoral and unjust; and to invade what is rightfully in his occupation is esteemed a crime against a primary law of nature. If, then, it is a crime to seize one's property, it can not be a virtue to deprive him of his liberty, which, in many instances, is his only means of acquiring that property. Then, upon all principles of right *slavery was an injustice*.—*The Antelope*, 10 Wheat. 120, 121; *Ruthf. Insts. of Nat. Law*, 240; *Curtis, J., in Scott v. Sanford*, 19 How. 624; *Dec. of Ind. par. 2, Rev. Code*, 1; *Const. of Ala. art. 1, § 2*; 1 Wooddes' *Lects.* 15; *Forbes v. Cochrane*, 2 B. & Cres. 448; *Somersett's Case*, Loft's Rep. 1; 11 Harg. *State Trials*, 339; 20 Howell, *State Trials*, 79;

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*Jones v. Van Zandt*, 2 McL. 596; Dig. 49, 15, 19, 2; Grot. de Jure Bel. L. 3, C p. 51.

23. Then, when the permission and protection on which this fabric of force and injustice had been erected, was withdrawn, it necessarily fell. For when the law fails, the right fails.—3 Dal. 378. By the great national edict which withdrew the force on which the institution stood, the slave was not declared to be emancipated, but slavery was forever forbidden. The power that upheld it was withdrawn. The language of the fundamental law is this: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."—Const. U. S. article 13, § 1, Revised Code, page 22. This is not the language of repeal; it does not acknowledge that slavery ever rested upon statute law, or upon right; but it denies its authority longer to exist. If any just legal power in the master, over the person claimed by him as his slave, ever existed, it takes this power away. It does not destroy the person held as a slave, but it destroys the authority of the master to hold him in subjection as such slave. It destroys the law of slavery altogether, and leaves the effects of this destruction to be determined by the States themselves.

24. In all sales, the intention and purpose of the parties is of the essence of the contract. In this, both parties must concur. There is no contract unless the parties thereto assent, and they must assent to the same thing and in the same sense. If one sells a slave for life, he asserts that he can pass such title, and he must be in a condition to make his assertion true; else the party who buys a slave for life does not get what it was his purpose to purchase. And the condition of such a sale is, that the vendor must make his title good, or the sale is violated on his part, and may be rescinded if the purchase-money is not paid, and the power to make title wholly fails.—2 Parsons on Contracts, 278, 279, and notes. In the sale of all personal chattels, the law implies an affirmation by the vendor, that the chattel is his own, and that he can and will make good such title as he sells, and such as the buyer intends to purchase.—

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*Cozains v. Whitaker*, 3 S. & P. 322; Benj on Sales, 474. And even without a warranty, it has been said to be the undoubted right of the buyer to recover back the purchase-money, on the ordinary purchase of a chattel, where he fails to get what he paid for; or if he has not paid the purchase-money, before the failure of the power to make title, he may refuse to do so, after the power to make title has failed or has become unlawful. The law will not make a party take and pay for what he did not intend or consent to buy.—Benj. on Sales, 308. The warranty is a part of the contract of sale; if this fails, then the sale fails with it. Here the power to make the warranty good, has wholly failed. It has become illegal and impossible, and the party bound by it is therefore released.—*Glover v. Taylor*, 41 Ala. 124; *Perry v. Hewlett*, 5 Por. 318; Ruthf. Insts. p. 144, § 39. *Presb. Church v. City of New York*, 5 Cow. 538; 2 Parsons on Contracts, pp. 674, 675.

25. Again, it is said, that no right can be founded on an injury or an injustice, or in violation of a law of God. This is a principle of common law, and though it may not heretofore have been applied in cases like the present, yet, there can be no doubt, if these contracts were based upon the sale of our more favored fellow-citizens, whose good fortune had colored their faces white instead of black, we would still treat it with marked respect, and very few would be found to stand up for the enforcement of the sales of the sons and daughters of the commonwealth, how long so ever they might have suffered in slavery. Yet, this is the question now under discussion; and, possibly, an old, familiar and carefully cherished, prejudice may interpose to prevent us from feeling its enormity.—Ruthf. Inst. p. 17; Const. Ala. Art. 1, § 2; Broom's Max. pp. 17, 18, (marg.)

26. But however this may be, it is certain that every contract, to have validity, must be founded upon a law. It is said that this law enters into it, and gives it its obligation.—*Von Hoffman v. City of Quincy*, 4 Wallace, 535, 550. And if this law, on which the contract stands, is repealed or abrogated, without exception in favor of such contract, the contract must fail, because it has no law to support it. If the law is taken away the obligation of the contract is



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gone. It is true that the State cannot assail a contract in this manner, by the repeal of the law on which it stands.—4 Wallace, 535, *supra*; *Green v. Biddle*, 8 Wheaton, 92; *Bronson v. Kinzie*, 1 Howard, 319; *Ogden v. Saunders*, 12 Wheaton, 231; *Sturgis v. Crowningshield*, 4 Wheaton, 122; *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *Terret v. Taylor*, 9 Cranch, 43; *Pl. Bk. vs. Sharp et al.*, 6 How. 327; *Beers v. Haighton*, 9 Pet. 359; *Mason v. Haile*, 12 Whea. 373. But in this case it is not the State that has abrogated the law of these contracts, but the national government or the people, upon whom there is no such limit or restriction.—*Evans v. Eaton*, Pet. C. C. 322.

27. Whether the government of the United States had the right to abolish the law of slavery in this State, can not now be made a question. It has been done, and the present State government of this State is organized upon the admission that it has been rightfully done. There is, then, now, no law in force to support these contracts for the sale of slaves in this State. The right to enforce, then, must rest upon law, or it fails. To say that they were once legal, and therefore remain legal, is not enough. It must appear that the law upon which they originally rested, still remains a law, or that in its abrogation they were excepted, or that there is some constitutional provision which protects them. But nothing of this kind can be shown. *Sublato fundamento cadit opus*.—Jenk. Cent. Cases, 160; *Hollingsworth v. Virginia*, 3 Dal. 378. Upon the extinction of the law of slavery these contracts became illegal, and a contract which is illegal, is void, in law. This is what the ordinance above referred to declares; and it violates no clause of the constitution of the United States or of this State.

28. Again—that which operates upon the consideration of a contract effects the contract itself. If the consideration fails, the contract fails. Here the character of the person sold was of the very essence of the consideration of the contract. The sale was that of a slave for life. This was the main and sole condition of the sale. It was the cause and purpose of the sale, and it constituted the

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entire consideration of the promise to pay the purchase-money by the vendee. The purchaser did not contract for the services of the person sold, but for the person himself, as for a horse or a mule—as for a thing constituting an article of property subject to perpetual continuance in the condition of a slave for life, so long as life lasted. This was the whole intention, expectation, and purpose of the sale; and this it was the purpose of the warranty to defend and make good. If this purpose is defeated, then the sale is defeated, and it does not effect what both parties intended it should accomplish. That the purpose and the expectation of the parties to the sale have been defeated, it would now be idle and reckless to deny. The purpose of the sale has been rendered illegal and impossible by the law—by the will of the supreme power in this State. It has wholly broken down the contract of sale on one side by rendering it illegal to fulfill it. Such legislation abrogates the sale.—5 Cow. 538, *supra*; 2 Pars. Contr. 674, 5th ed.

29. It must be admitted that the *status* of the person sold, who created the whole consideration of the contract of the sale, has been changed by law, or which is the same thing, by the national will—which is law in this case. This change has defeated the purpose of the contract. It has rendered that purpose unlawful. This is similar to the case, where a party agreed to import goods within a certain time, and before the time arrived, the government interposed by embargo, and made the performance of the agreement unlawful. This would put an end to the contract. It would repeal it. This case is almost identical in principle with such a case as that. Here the vendor can not do what he promised to do—that is, make the person sold a slave for life.—Pars. Contrs. 5th ed. p. 674; *Presb. Church v. City of New York*, 5 Cowen, 538; *Brewster v. Kitchen*, 1 Ld. Raym. 317, 321; 1 Salk. 189.

Emancipation was an assault, by the law, upon the consideration of the contract of sale which destroyed it. This causes the contract to fail, and overturns the mutuality of the agreements which constituted the sale. It suffers the plaintiff to be released on his part, and then to turn round

on the defendant and compel him to perform his part of the agreement of sale! There is, I apprehend, no admitted principle of law that sustains this result. It is radically wrong and unjust. And whatever we may think to the contrary now, the time will come, and is even now at our doors, when this outrage upon principle will be denounced and driven from our courts, where justice, in this absence of a statute, should be the measure of a law. *Equum et bonum est Lex Legum*.—Hob. 224; Const. Ala. art. 1, § 15.

30. A contract consists of a promise, a consideration, and a condition—(Daniel Webster)—and in all contracts of mutual benefit, whatever obligation one party is under to give or to do, it is undertaken upon condition of his receiving the equivalent agreed upon. If, therefore, he fails to receive such equivalent by the other's non-performance or inability to perform, the condition fails, upon which he consented to be obliged, and he ceases to be longer under obligation.—Ruthf. Insts. p. 141, § 36. Whilst the whole of the sale remains as the parties understood it, and intended it, with all the remedies on both sides unimpaired, as they were at the time the sale was entered into, then it would be just to enforce it on both sides; but when the law intervenes and prevents this, the law breaks down this mutuality of obligation, and discharges the party on the one side. It also releases the party on the other. In a word, it puts an end to the sale as the parties made it, understood it, and assented to it. This destroys the sale. And so the ordinance of the convention, under discussion, has declared. The new facts which effect these contracts since emancipation, required a new rule to measure their force under these new facts. This could be supplied only by law, through the legislative power of the State. In this, the State could act without any restraint upon its sovereign authority, and may do what it pleases. The limitations upon the States are not to be extended by construction; and a law will not be held to be unconstitutional, unless it is clearly and plainly so.—*Falconer v. Campbell*, 2 McL. 195; *Hubbard v. N. R. R. Co.*, C. C. 84; *Booth v. Town of Woodberry*, 5 Amer. L. Reg. N. S. 202; *Fletcher v. Peck*, 6 Cra. 87, 128. Here this contract was



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impaired by the action of the national government, and the State has simply declared what this impairment shall have in its own courts.—*Wainwright v. Bridges*, 19 La. An. 234; 3 Am. Law Rev. 333, 334; *Burbridge v. Harrison*, 20 La. An. 357. In making these sales, the parties had no reason to suppose that they would be interfered with by law, as they have been. They had no idea that they would thus be defeated. Here there was that which amounted to a false affirmation innocently made, and the purchaser was certainly misled by it. This justifies the rescission, and the property, if valueless, need not be returned.—*Smith v. Richards*, 13 Pet. 26; *Christy v. Cummins*, 3 McL. 386; *Gunnel v. Dade*, 1 Cr. C. C. 427.

31. Here the doctrine of *vis major* does not apply, because the property sold was not destroyed by act of God or by the public enemy, but by act of law. The national authority has said that the vendor of the slave shall not make good the title that he sold; and then the State intervenes and declares that this interference puts an end to the contract of sale, and that the price shall not be recovered in the State courts. This is just what the parties themselves would have done, had they been in a condition to anticipate the present results.

32. It can not, with any just reason, be expected that there will be found decided cases upon all the questions arising out of the late war, and the legislation to which its complications have given rise. That which has been done without law, and in spite of law, or which has been assailed by law, must be settled by the courts according to "right and justice," if there is no statute to direct.—Const. Ala. article 1, § 15. But if there is a statute to direct, it must be followed, unless it is void for want of constitutional conformity. Undoubtedly according to "right and justice" the vendee would not be bound by a contract of sale of personal chattels, which the vendor had no power of carrying into effect, as the parties understood it at the time it was made.—Smith on Contracts. If a party makes a sale of personal property, and it is destroyed at the date of the sale, this defeats the agreement of sale.—1 Par. on Con. 521, 522. The like would be the case if it

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was destroyed before delivery ; and it is presumed, if the law forbid the delivery, it would have the same effect.—*Nerot v. Wallace*, 3 T. R. 17 ; *Bates v. Court*, 2 B. & C. 474. Now this is so, because there is a law making this the rule. Here, although there was an agreement of sale, yet before the price was paid, the supreme law interposes, and takes from the vendor the power of conferring the benefit up to the extent that the benefit proposed to go, both in fact and in law, so as to make the title good. It does not simply make the vendor's title bad, but it declares that he shall not be bound to make it good. It discharges him from his warranty.—5 Cow. 538, *supra*. If the vendor accepts this discharge, then he makes the act of the government his own. He takes the benefit, and should suffer the loss. He is discharged from his warranty, and should give up the price. Under this new condition of the facts, the State legislative authority intervenes and makes a new rule, for the guidance of its courts. That is, it declares, that these emasculated sales shall not be the foundation of an action in its courts. This is certainly not the power denied by the federal restriction. The ordinance being within the limit of State legislative power, the court is bound to enforce it. This tribunal is not to judge of its fitness or its unfitness ; its policy or impolicy ; its wisdom or its folly ; its justice or its injustice. If it is a law, it must have the effect and force of law. It must be obeyed.

33. If the proclamation of emancipation had any force at all, it must have had the same effect everywhere—all over the nation—except in those places where it was otherwise limited, because it was a national act, and it was executed by the national authority. It was a proclamation of the national policy, and as such it was confirmed by the acceptance of amnesty by the people of this State, under President Johnson's proclamation, dated the 29th day of May, 1865 ; and this confirmation must be referred to the thing confirmed.—1 Bouv. Law Dict. (12th ed.) *Vox Confirmation*, page 319. So far, then, as the case of *Leslie v. Langham* conflicts with this view of the law, it ought to be over ruled.—40 Ala. 524 ; *Nelson, Adm'r, v. Morgan, Adm'r*, June term, 1869.

34. The seeming injustice of an affirmance of the judgment below, appears from the fact, that the appellant will be made to pay quite eight thousand dollars, in legal funds, to the appellee, for property in persons, now citizens of the State, who had been declared enfranchised by the nation, and whose emancipation the nation was most solemnly pledged to make good; and, yet, get comparatively nothing of any value for his money. This shows how reluctantly the human mind is disposed to divide out the false goods of an old, selfish idolatry, and to do RIGHT, though the heavens may fall. It may be permitted moderately to deplore, though we can not help, such a painful departure from the *law of laws*.—Constitution of Ala. 1867, article 1, § 15; Hob. 224.

35. I, therefore, think that both the ordinances above referred to, are free from any clearly defined constitutional objections, and that the judgment in this case ought to be reversed and remanded.

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## HOOD vs. THE STATE.

### [INDICTMENT FOR PERJURY.]

1. *Judgment, motion in arrest of; must be disposed of, in criminal case, before sentence.*—In a criminal case, a motion in arrest of judgment must be finally disposed of—it must be overruled or allowed—before the court proceeds to pronounce sentence against the accused.
2. *Perjury; when can not be charged on affidavit for attachment.*—Perjury can not be charged on an affidavit, made before the clerk of the circuit court for the issuance of an attachment, unless the affidavit asserts the facts required by the statute authorizing the process, and these statutory facts are alleged to be false.
3. *Perjury; definition of.*—Perjury is a corrupt, willful, false oath taken in a judicial proceeding in regard to any matter or thing material to a point involved in the proceeding. The advice of the attorney who prepared the oath and advised the accused to take it, is competent to show what was said and done at the time the oath, alleged to be false,



was sworn to, for the purpose of showing an absence of corrupt intent, or that the accused was misled or mistaken.

4. *Same.*—Generally, an oath to sustain a charge of perjury must not only be untruthful, but it must also be corrupt, unless the statute otherwise directs.

APPEAL from the Circuit Court of Pickens.

Tried before Hon. L. R. SMITH.

The indictment in this case charges, "that before the finding of this indictment, Jerry Hood, (f. m.,) on application for suing out an attachment in a civil action in the circuit court of Pickens county, in which one Thomas J. Coleman was defendant, and said Jerry Hood, (f. m.,) plaintiff, being duly sworn by the clerk of said court who had authority to administer such oath, falsely swore that he had reason to believe that said crops, cultivated as aforesaid, would be removed from the premises where they were grown, without full payment of all wages due affiant as said laborer, for his said services, without his consent; the matter so sworn to being material and authorized by law, and the oath of said Jerry Hood, (f. m.,) in relation to such matter, being willfully and corruptly false," against the peace, &c.

The defendant pleaded not guilty, went to trial on that plea, and was found guilty "in manner and form as charged in the indictment."

On the trial, as shown by the bill of exceptions, it having been proven on the part of the State, among other things not material to an understanding of the points here decided, that the affidavit was read over and explained to said Jerry Hood, by his attorney, before the same was subscribed, the defendant offered to prove, "as a part of the *res gestæ* of the affidavit, that the legal adviser and attorney-at-law of the defendant, who drew the said affidavit, bond and writ of attachment, advised the defendant, when he was about to make said affidavit, that he might properly do so;" but the court refused to receive the evidence, and the defendant excepted.

After the accused was convicted, but before sentence was passed upon him, as appears from the judgment entry, the

accused, on "being brought before the court to receive his sentence, and being asked if he has any reason why the sentence of the court shall not be passed upon him, whereupon he answers the error assigned in his motion for the arrest of sentence of judgment; which motion is by the court continued, and the defendant is sentenced as follows: [Here follows sentence of imprisonment in penitentiary.]"

The errors assigned are—

- "1. The indictment is defective.
- "2. The court erred, as shown in the bill of exceptions.
- "3. The court erred in passing sentence.
- "4. The court erred in passing sentence without first deciding the motion in arrest of judgment.
- "5. The court erred in the judgment rendered."

TERRY & WILLETT, and A. J. WALKER, for appellant.—  
I. The indictment in this case was defective for the following reasons: 1. The statute, (§ 558) following the common law, requires that the oath should be material and should be authorized by law. The form given in the Revised Code (see Form No. 45, p. 812,) shows, that the necessity of a legal averment of the facts, that the oath was material, and was authorized by law, are not dispensed with. On the contrary, the form contemplates a statement of the facts.

2. The indictment neither shows, *from the facts*, that the affidavit was material, nor that it was authorized by law. It is true, the indictment says in words that the affidavit was material and authorized by law. This, however, is only the statement of a legal conclusion, which is not a legitimate mode of pleading, and can not be tolerated unless expressly authorized by the Code. This the Code does not do, because in the prescribed form it expressly requires a statement of the facts. These facts, from which the materiality of the oath and its authorization by law might be inferred, are not stated.

3. It does not appear what the object of the attachment was. It may have been, as far as the indictment discloses, for the collection of an ordinary debt, and the matter of the removal of the crop covered by the indictment may

have been utterly immaterial. In criminal pleading, things are not to be taken by intendment.

II. The attachment affidavit can be referred, if we resort to intendment only, to the act of 10th October, 1868.—Pamphlet Acts, p. 252. Under this act it is perfectly clear, that the oath does not seem to have been material, or authorized by law, for the following reasons, viz :

1. The act of 10th October, 1868, very clearly contemplates that the oath shall be *on affidavit—that is, that it shall be in writing*. Such a thing as the issue of an attachment without a written oath is unknown in the jurisprudence of Alabama. The affidavit is a paper in the cause, and may be the predicate of proceedings in the cause. Now, from the indictment, it does not appear that anything more than a mere verbal oath was ever taken by the defendant. If so, it was utterly immaterial. The oath, if not in writing, was not material and was not authorized by law.

2. The oath, if in writing, is utterly immaterial.

3. The *belief* of the party was altogether immaterial upon the question of issuing an attachment. The act requires a positive oath in writing. But this oath was not, even according to the indictment, a statement of a belief of the party, but a statement that he had reason to believe. That the party had reason to believe, is no ground of attachment, and is not recognized in the statute, and was utterly immaterial. To sustain this indictment, it is necessary to maintain the proposition, that the defendant is responsible criminally for the clerk's ignorance of law.

The indictment, in speaking of "cultivated as aforesaid," is simply nonsense.

III. One of the questions of the case was, whether the false swearing was willful and corrupt? The declarations of the defendant, at the time he took the oath as to his belief and the grounds of that belief, were certainly a part of the *res gestæ*, and should have been admitted upon the question of the intent with which the oath was taken, whether its falsehood was willful and corrupt or not. Especially is this proposition true, when the affidavit was not as to a matter of fact, but as to the belief of the accused.

IV. The court certainly did wrong to continue the mo-



tion in arrest of judgment and still sentence the prisoner to the penitentiary. The record shows that the prisoner made a motion in arrest, and that the motion was continued. The effect of the motion in arrest was to continue the case *sub judice*. The prisoner had a right to make the motion, and to have it decided. The court had no right, pending that motion and without deciding it, to sentence the prisoner. It is as if a man were found guilty of a capital offense, and hung pending the consideration of a motion in arrest. It amounts to the passage of sentence before the trial is terminated. This action of the court, in sentencing a man pending his motion in arrest, is absolutely monstrous.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—The constitution of this State forbids that any person shall “be deprived of his life, liberty or property, but by due course of law.”—Con. Ala. 1867, art. I, § 7. Due course of law, in this sense, means that every person who is charged with an offense, shall be charged and tried as required by the laws of the land, and not otherwise. And for this purpose, in a criminal prosecution, the record must show that the accused is charged with an indictable offense according to the forms of law, and that his trial has been conducted as the practice, required by the law, prescribes. If these requisites, on the face of the record, appear to be wanting, it is the duty of the court to refuse to give judgment, on motion pointing out the deficiencies. This is called a motion in arrest of judgment. And the effect of such a motion, if granted, is to set aside all the proceedings in the case, and allow a judgment of acquittal to be entered. This motion can not be made before the verdict, nor can it be made after the sentence. It, therefore, comes properly between the verdict and the judgment of condemnation; and it must be decided before the sentence is pronounced. It can not, therefore, be continued until after sentence.—1 Chitty’s Crim. Law, 661; 1 Bish. Crim. Proc. p. 850, § 850, *et seq.* The constitution and the statute law recognize the right of the accused to have the judgment

against him arrested, as one of his means of defense, and it is error improperly to defeat its effect.—Const. Ala. 1867, art. I, § 7; Rev. Code, § 4146. It may be said, that to continue such a motion until after sentence is pronounced is tantamount to its refusal, and that it ought to be so treated. Such is not the legitimate effect of a continuance. It is an order intended to keep the proceeding before the court for future disposition, not an order of final disposition. To treat it otherwise, would lead to confusion.—1 Chitty's Pl. 421, note; 3 Black. Com. 316.

This might be sufficient to dispose of this case and send it back to the circuit court for a new trial. But there is another question which arises on the record, that will be important on a new trial; that is, the sufficiency of the charge alleged in the indictment, and the materiality of certain testimony offered by the accused in the court below, in explanation of his act in taking the oath.

Perjury is a corrupt, willful, false oath, taken in a judicial proceeding, in regard to a matter or thing material to a point involved in the proceeding. This oath must be taken before some officer or court having authority to administer it. This is a statutory proceeding, and the affidavit required is a statutory oath. This is the oath that the clerk is authorized to administer. His powers are not general, but special, and he can not exercise a broader jurisdiction than is conferred upon him by the statute.—Revised Code, §§ 680, 645, 771; Pamph. Acts 1868, page 252. The clerk has no power to construct a new oath, different from that prescribed by the statute. He must confine his action to the authority thus given.

The act prescribes that certain facts shall exist, and that affidavit of "either" of these facts being made, and bond given, or affidavit of the plaintiff's inability to give such bond being also made, the attachment shall at once issue. The affidavit made by the accused, for the falsehood of which he is indicted, is quite different from the one required and authorized by law. It is an affidavit that the affiant "had reason to believe" that certain crops *would* be removed from certain premises, without full payment of certain wages, without affiant's consent. This was no grounds

upon which an attachment could issue. It is not the oath required by the statute. The facts upon which an attachment could issue, as required by the statute, are the actual removal of the crops or a portion of them, or the act of being about to remove them or a part of them; the non-payment of wages owing to the laborer, and the removal or attempt to remove them or a part of them without his consent; and not his mere belief of such facts. Such an affidavit may possibly be amended so as to make it conform to the requirements of the law, but until it is so amended, its allegations and statement of facts, though untruthful, can not be regarded as material to the proceedings in such sense as to support a charge of perjury.—Revised Code, §§ 2989, 2990.

Evidence of the advice of the attorney of Hood, at the time the affidavit was drawn and sworn to, was competent to show the absence of corrupt motive. It was competent to show that the accused might have been thus led into a mistake. Then the oath, though untruthful, could not have been perjury.—*The State v. Lea*, 3 Ala. 602; 2 Hawkins' Cr. Pl. b. I, ch. 69, § 2, p. 8, (7th London ed.) The court erred in rejecting it, as shown in the bill of exceptions. I may also add, that it admits of grave doubt whether the indictment in this case is sufficient.—Rev. Code, § 4139.

The judgment of the circuit court is therefore reversed, and the cause is remanded for further proceedings in the court below, in conformity with this opinion. The accused, Jerry Hood, will be held in custody until discharged by due course of law.



HORN, EX'R, *vs.* BRYAN ET AL.

[PETITION TO PROBATE COURT TO AMEND AND COMPLETE PARTIAL DECREE, RENDERED BY IT, AT A SUBSEQUENT TERM AGAINST EXECUTOR WHO HAD MADE FINAL SETTLEMENT.]

1. *Executor, final settlement of; what order probate court has not jurisdiction to make.*—After a final settlement of an executor's accounts, the probate court has no jurisdiction to entertain a petition, by a distributee, to complete a decree rendered against the executor on partial settlement, and to issue execution upon it.

APPEAL from Probate Court of Marengo.

Tried before Hon. THOS. J. WOOLF.

The facts of this case sufficiently appear in the opinion.

S. J. CUMMING, for appellant.

MORGAN & LAPSLEY, *contra*.

B. F. SAFFOLD, J.—The appellees, on the 24th of July, 1867, petitioned the probate court to complete a decree, rendered in 1860, against the appellant, whereby it was ascertained, on a partial settlement of his accounts, that, in his representative capacity, he was indebted to the said Frances L. Bryan, in the sum of \$2,718 98, and he was directed to retain the money, subject to the further order and decree of the court, on the termination of a certain chancery suit between the petitioners concerning it, and also petitioned the court to issue execution upon the decree.

The appellant moved to dismiss the petition, on the ground that he had made a final settlement of his executorship in 1864, and had paid the decree then rendered against him. The motion was overruled, and the court rendered a decree against the executor in favor of the petitioners according to the prayer of their petition, with some exception.

Both parties appealed from the decree. The appeal taken by the petitioners was heard at the January term,

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 Buford et al. v. Tucker.
 

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1868, of this court and the decree was reversed, on the ground that the probate court had no jurisdiction to take further action in the matter, after the final settlement, and a decree was rendered in this court dismissing the motion of the petitioners in the probate court.

The facts and the authorities sustain this disposition of the case.—*Modawell v. Holmes*, 40 Ala. 391; *Slatter and Wife v. Glover*, 14 Ala. 650; and the authorities cited in the opinion at the January term, 1868.

The decree of the probate court is reversed. The petition of the appellees is dismissed out of that court, at their cost, and they must pay the costs of this court.

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## BUFORD ET AL vs. TUCKER.

[ACTION ON PROMISSORY NOTE GIVEN FOR HIRE OF A SLAVE.]

1. *Hire of slave, note for; what no defense against.*—The fact that a slave, hired for the year was taken from the possession of the hirer in the spring of the same year by the presence of the Federal army, and not regained, is no defense against a note given on 1st of January, 1865, for the hire of the slave for that year. The hirer is nevertheless bound for the hire of the slave for the entire term for which the contract of hiring was made.
2. *Custom, evidence of; what does not constitute requisites of.*—An alleged custom, that has its origin only some three or four years before, is not such a legal custom as will displace the general law. Such an alleged custom must want all the necessary requisites and elements of a good custom. It certainly wanted antiquity, and must also have wanted certainty, consent, obligation, and the other elements of a good custom. Evidence offered, therefore, to prove that at the time of hiring a slave, there was a general, notorious, custom in the neighborhood and county in which said hiring was made, that where the word dollars was used in contracts, and nothing said of the kind of dollars, the parties understood and meant Confederate money, was properly rejected, on motion of the party against whom it was offered.
3. *Charge of court; what erroneous, as to amount of recovery for hire of slave.*—Where there was evidence before the court that the slave was not worth, in good money, the sum agreed to be paid in the note, a

charge to the jury that the plaintiff was entitled to recover the amount of the note and interest, is erroneous.

4. *Hire of slave; what amount hirer entitled to recover, for.*—The hirer is only entitled to recover the value of the services of said slave, as a hireling, at the time of the hiring, in lawful money of the United States.

APPEAL from the Circuit Court of Lowndes.

Tried before Hon. GEORGE GOLDTHWAITE.

This was an action on a promissory note, executed on the — day of January, 1865, for the hire of a negro woman, a slave, and several children, for the year 1865. No pleas appear in the record. The case was tried before a jury and resulted in a verdict for the appellee, the plaintiff below.

From the bill of exceptions, it appears that it was proved on the trial, that said slave was taken from the appellants (defendants below) by the presence of the Federal army, in the spring of the year 1865, and that she was never regained by them; and that the services of said slave were not worth the amount of the note in good money. The defendants also offered evidence to the effect, that said note was made in Lowndes county in this State; that the contract of hiring was between persons resident at that time in said county; that at the time of giving said note, the only currency circulating in the county was Confederate treasury-notes, and treasury-notes of the State of Alabama, redeemable in Confederate treasury-notes; that there was at the place, and in the county, generally, where said note was given, a general and notorious custom, that where the word dollars was employed in a contract, and nothing said of the kind of dollars, that the contract was to pay in Confederate money. The plaintiff objected to the admission of this evidence, and the court sustained the objection and excluded the evidence, and defendants excepted.

The court charged the jury, that the plaintiff was entitled to a verdict for the amount of the note and interest, less the amount of a set-off proved, and defendants excepted.

The exclusion of the evidence of the alleged custom, and the charge of the court, are now assigned for error.



STONE, CLOPTON & CLANTON, for appellants.

CLEMENTS & WILLIAMSON, *contra*.

PECK, C. J.—There was no error in excluding the evidence offered in relation to the existence of the alleged general custom, said to have existed at the place, and in the county, where the note was given.

We know, historically, that Confederate currency—treasury-notes—was first issued about the year 1862, and, therefore, the alleged custom wanted nearly all the necessary requisites and elements of a good custom. It certainly wanted antiquity, and it must also have wanted certainty, consent, obligation and the other elements of a good custom.

2. The evidence of the character of the currency in circulation, &c., was competent and proper, but without such evidence, the courts will take notice without proof, that as a general thing, among the people, at the date of said note, contracts were made with reference to Confederate currency.

Judge Ormond, I think, in the case of *Bates & Hines v. The Bank*, 2 Ala. Rep., said, in substance, he could see no reason why the court should be ignorant of what all the rest of the world knew.

The charge of the court, therefore, was wrong in directing the jury, that the plaintiff was entitled to a verdict for the amount of the note and interest, less the set-off proved; the plaintiff was only entitled to recover what, at the date of the note, the services of the slave were worth in the year 1865, in the legal currency of the United States. He was, however, entitled to recover for the services for the entire year 1865. By the contract of hiring, the defendants became the owners of the slave, for the time of the hiring, and if emancipation took place before that time expired, the owner must lose her property in the slave, and the hirer must lose the services of the slave for the period stipulated.

Let the judgment be reversed, and the cause remanded, for a new trial at the costs of the appellee.

## MAHONE vs. HADDOCK ET AL.

[BILL IN EQUITY TO SET UP AND ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND.]

1. *Lien for unpaid purchase-money of land.*—M. sold and conveyed by deed, with full warranty of title, in 1852, a tract of land to H. for \$800. Of this sum, \$300 were paid at the making of the deed, leaving a balance of \$500 of the purchase-money unpaid. For the payment of this \$500, H. executed his bond to M., of the same date with that of the sale, with this condition: "If the said title (the warranty deed) shall be sustained, and his (M.'s) right to make said deed shall be established, in a suit about to be commenced against me (H.) for said land, so that said title shall be declared a good and lawful title to said land, then the above bond shall be of full force against me (H.) for the payment of the money therein specified; but if such title shall fail, then I (H.) am bound to deliver said deed to M. as cancelled, upon which he (M.) is to deliver up the bond as cancelled." H. went into possession, under the contract of sale, and died in possession, and his distributees and representatives continued in the possession of the land after H.'s death, up to the filing of the bill, in February, 1862. No suit was ever brought against H. for the land, as was apprehended at the making of the bond, and nothing appeared to threaten the legal sufficiency of the title from M. to H. M. died in Georgia, in 1856, and his widow administered on his estate in that State, and thereafter was married during her administration to E., and E. and his wife, as administrator and administratrix, in Georgia, of M.'s estate, transferred and assigned the bond for \$500 to Mahone, the complainant: *Held*,—that the bond in the possession of Mahone, as transferee, is a lien upon said land for the unpaid purchase-money, and the suit to enforce the same was not prematurely brought.
2. *Vendor's lien; what not destroyed by.*—The failure to present the bond, for the balance of the unpaid purchase-money, to the administrator of H., within the time required by law to prevent a bar, does not cut off the vendor's lien; it only cuts off the right of the transferee to participate in the distribution of the estate of H. with the other creditors, who have duly presented their claims.
3. *Foreclosure, right of; when barred.*—The right to foreclose, in such a case, is only barred when a mortgage, for like purpose, would be barred.

APPEAL from the Chancery Court of Macon.  
Heard before Hon. N. W. COCKE.

The facts are sufficiently set out in the opinion.

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Mahone v. Haddock et al.

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GUNN & STRANGE, for appellant.

GRAHAM & ABERCROMBIE, for appellees.

PETERS, J.—The bill in this case was filed by William C. D. Mahone, against Thomas W. Haddock and others, in the thirteenth district of the southern chancery division of this State, in the year 1862. The final decree dismissing the bill purports to have been rendered in 1867, but it has no date. From this decree Mahone appeals to this court.

It is shown by the allegations of the bill, that William Matheson sold and conveyed to John B. Haddock a tract of land lying in the county of Macon, in the State of Alabama, for the sum of eight hundred dollars. Three hundred dollars of this sum was paid at the sale, and the payment of the residue was secured to be paid by Haddock's obligation to Matheson, bearing date August 14, 1852; which is in the following words:

“Georgia, Muscogee county.

“Know all men by these presents, that I, John B. Haddock, of the county of Macon and State of Alabama, do hereby acknowledge myself bound, and do promise to pay to William Matheson, his heirs and assigns, the sum of five hundred dollars for value received, and for payment of which I bind my heirs, executors and administrators jointly and severally, firmly by these presents.

“With the following condition and understanding: that whereas, the said William Matheson has this day made me a title to the south half of section twenty-nine, in township fifteen of range five, in the county of Macon and State of Alabama, which he claims as heir-at-law of George Smith, deceased. Now, if the said title shall be sustained, and his right to make said deed shall be established in a suit about to be commenced against me for said land, so that said title shall be declared a good and lawful title to said land, then the above bond shall be of full force against me for the payment of the money therein specified; but if said title shall fail, then I am bound to deliver said deed to said Matheson as cancelled, upon which he is to deliver up the



bond as cancelled. Witness my hand and seal, this 14th August, 1852. J. B. HADDOCK, [seal.]

“Test: Wiley Williams.”

Haddock took possession of said land under said contract of sale, and received from Matheson and wife a deed for the same, with full warranty of title, of the date of August 14th, 1852.

Matheson died in December, 1855, in the State of Georgia, leaving his wife and several children surviving him; and Haddock died in December, 1859, in this State, leaving a widow and several children surviving him. Mrs. Matheson administered on her husband's estate in Georgia, after his death, in January, 1856, and in September, 1858, whilst she was such administratrix of the estate of said William Matheson, she intermarried with Theo. Ewing, and Ewing thereupon, by virtue of said marriage, in right of his wife, said Elizabeth Ewing, became administrator of the estate of said Matheson in the State of Georgia.

On November 21st, 1860, said Mahone, in due course of trade and for valuable consideration, became the transferee and assignee of said obligation, above set out, from said Ewing and his wife, said Elizabeth Ewing, as administrator and administratrix of the estate of said Matheson, deceased; and thereupon said Mahone became subrogated to all the rights intestate and his representatives and heirs had in the collection of said obligation, and that said obligation was a lien on said land therein named for the balance of the purchase-money unpaid thereon.

It was further alleged, that the suit which was anticipated and alluded to in said condition of said obligation had not been brought, and that it never would be brought; and that the title made by Matheson to Haddock to said land was and still is a good and lawful title to said tract of land. And that said intestate Haddock, in his life-time, nor the representative of Haddock, since his death, had not paid said purchase-money named in said obligation, or any part thereof, and that the same was wholly unpaid and due; and that after the death of said Haddock, George W. Nicholson had been appointed administrator of his estate, by the judge of probate of said county of Macon in this State;

and that said Nicholson had reported said estate insolvent, and that said estate is likely to be settled as an insolvent estate. It is also alleged, that the annual rent of said lands since they went into the possession of said Haddock, had been worth a large sum of money, to-wit, \$500. The original obligation above set forth has an assignment written thereon in the following words :

“The State of Georgia,    }    We, T. Ewing, adm'r, and  
       Muscogee county.        } Elizabeth Ewing, adminis-  
 tratrix, transfer and assign the within bond, obligation or  
 note to William C. D. Mahone, or his heirs and assigns,  
 and give him entire control and direction of the same, for  
 value received. Witness our hands and seals, this the 21st  
 day of November, 1860.

T. EWING, Adm'r, [L. s.]

ELIZABETH EWING, Adm'rx, [L. s.]”

It is alleged that this assignment was made by the said Ewing and wife as the administrator and administratrix of the estate of said Matheson, who were legally such, by appointment under the court of ordinary of the county of Muscogee in the State of Georgia, as authorized and required by the laws and constitution of the said State of Georgia, and that the assignment so made vested in said Mahone all the rights of said Matheson and his heirs to said obligation ; and the laws and constitution of Georgia, showing the jurisdiction of said court, are made exhibits to the bill.

The said T. Ewing and his wife, Elizabeth, as the representatives of the estate of said William Matheson, deceased, and the heirs and distributees of the said William Matheson are made parties defendant to the bill ; so is Geo. W. Nicholson, as the representative of the said John B. Haddock, deceased, and the heirs and distributees of said Haddock are made parties defendant to the bill. And the relief asked is, that the land shall be sold for the payment of the balance of the purchase-money unpaid, or that the sale shall be cancelled and rescinded, and for general relief.

All the parties to the bill are properly before the court.

The minors put in a formal answer, alleging that their knowledge of the matters in controversy is wholly by information, and ask for due proof of the facts set forth in the bill.

George W. Nicholson, as the representative of the estate of John B. Haddock, deceased, and for himself and his wife, Celia, formerly Haddock, puts in an answer, in which he admits the sale of the land as shown in the bill, and the death of the parties to the original transaction. He denies the transfer of the obligation bearing date the 14th day of August, 1852, executed by Haddock to Matheson, as stated in the bill; and he also denies that the complainant is subrogated to any rights under said bond, and that complainant has any lien upon said land for the payment of any purchase-money due from him or his intestate, or otherwise, for said land; and he denies that said transfer was ever executed by said Ewing and wife. And by way of plea he also answers, that said claim for the debt mentioned in said bond was never presented to him, as such administrator as aforesaid, within eighteen months after notice of said administration was published, or filed in the probate court of Macon county within that time. He admits that the estate of Haddock had been declared insolvent. He denies that any portion of the purchase-money for said land is due from his intestate.

There are two questions which arise on the allegations and proofs submitted in this case.

The first is, had Mahone such a title to the bond executed by Haddock to Matheson, on the 14th day of August, 1852, as would entitle him to enforce the same in a court of chancery? And the second is, had the time arrived that he was authorized to proceed by suit to enforce the collection of the bond at the time he filed his bill?

It appears, from all the proofs, that Mahone came rightfully into possession of the bond in controversy, on the 21st day of November, 1860; that he held it as the transferee of T. Ewing and Elizabeth Ewing, who were the administrator and administratrix of the estate of William Matheson, deceased. Mrs. Ewing and her husband are parties to the bill, and they confess, as against themselves



and the estate they represent, that the transfer was made as alleged in the bill. This is also proven by the testimony of Alexander Matheson. The answer does not deny that Ewing and his wife were the representatives of the estate of William Matheson, deceased, in the State of Georgia, properly appointed by law in that State; but the respondent Nicholson admits that he does not know this fact, and demands proof. The proofs show that Mrs. Ewing was appointed administratrix of her deceased husband's estate before she intermarried with Ewing, and that Ewing, after such marriage, was appointed administrator *de bonis non* of Matheson's estate in 1858, before the transfer to Mahone.

It does not appear that Mrs. Ewing ever resigned her administration of her husband's estate, either before or after her marriage with Ewing. There is no proof showing what the laws of Georgia are which govern such a state of facts. In such case, if no statute law is shown, the court presumes that the common law prevails in that State and governs the relations of the parties.—*Reese v. Harris*, 27 Ala. 301; *Foster v. Glazener*, 27 Ala. 391; *Ellis v. White*, 25 Ala. 540; *Walker's Adm'r v. Walker's Adm'r*, 41 Ala. 353. At common law, the marriage of the wife administratrix entitles the husband to administer in his wife's right for his own safety, and he has the power of disposition over the personal property vested in the wife as administratrix. 2 Wms. on Ex's, 698, marg. Then the transfer of the bond by Ewing and his wife was sufficient to vest in Mahone a title which would authorize him to sue in equity.

The other question is one of more difficulty of solution. But evidently Matheson did not intend, by the whole contract, to transfer the lands mentioned in the bond and the deed to Haddock for the sum of three hundred dollars, which was paid at the date of the sale, and release him from the payment of the residue of the price agreed upon, or to postpone the payment of the \$500 beyond a reasonable time. But the condition of the bond was so drawn as to defend Haddock from a contingency, which, at the time the sale was made, it was supposed was about to happen. If this contingency did happen, then the sale was to be rescinded, or the bond and the deed were to be cancelled.

This was evidently the meaning and purpose of the parties. The words of the condition are, "if said title should be sustained, and his (Matheson's) right to make said deed should be established, (in a suit about to be commenced against me (Haddock) for said lands,) so that said title *shall be declared a good and lawful title* to said land, *then* the above bond shall be of full force against me for the payment of the money therein specified; but if the title *shall fail*, then I am bound to deliver the deed to said Matheson as cancelled, upon which he is to deliver up the bond as cancelled." Now, it seems to me that the parties to the bond intended to make the payment of the sum of money therein named dependent upon the efficiency and legality of the title, made by Matheson to Haddock, and not upon the bringing of the suit referred to in the condition. It was only upon a failure of the title, that the contract was to be rescinded. And it was this that the parties intended to provide against. The suit was incidentally mentioned as likely to occur, and if it did occur, its effect, in defeating the title, was to be provided against. It was not intended, if no suit was brought, the money should not be paid.

Then, if Haddock got what it was his intention to buy, that is, the land with a good title, such as the deed professed to convey, he ought to pay the price that he promised to give—that is, the sum mentioned in the bond, and interest from the time it became payable.

The bill alleges that Matheson's title to Haddock is legal and sufficient, and no suit has been brought to *disturb it*, or will ever be brought. These allegations are not denied, or evaded by any of the defendants. They refer to facts equally open and known to all the parties, and should have been met by a direct denial. There is no proof, or intimation of proof, that they are not true. So, the title by the deed has not failed, and there is no fact disclosed or pretended, that would justify any serious belief that it will fail. And if the representative of the estate of Haddock elects to hold on to the land under the deed of Matheson, he must pay the price agreed to be given for it, if there is no other valid objection to its payment.—2 Bouv. L. Dic. (12th ed.) *Vendor's Lien*, p. 633.

The bond given by Haddock to Matheson, of August 14th, 1852, for five hundred dollars, in the hands of the complainant Mahone, is a lien for the payment of the purchase-money due and unpaid. The transfer of the bond to Mahone passed all the equity in favor of Matheson to Mahone.—4 Kent, 151, 152, 153, 154; *Day v. Preskett*, 40 Ala. 625; *Conner v. Banks*, 18 Ala. 42; *Burns v. Taylor*, 23 Ala. 255. The failure to present the claim to the administrator within the eighteen months required by the statute, does not cut off the right of the transferee of the bond to enforce the vendor's lien; it only deprives him of the right to participate in the distribution of the estate.—*Duval's Heirs v. McLoskey*, 1 Ala. 708; Rev. Code, § 2239. The debt is not extinguished, but the right of action against the administrator is barred. It is presumed that if the intestate had been a mere security to the bond, the effect of the right of action against him would not have released another security who was not so situated as to claim the same bar. Here the lien is a separate security in the nature of a mortgage, and it can only be barred when the mortgage would be barred. And the decree upon the bond may be simply for a foreclosure of the mortgage, or it may be for a foreclosure of the mortgage and for the debt also, except when the debt is barred, as it is in this case, if the proof sustains that allegation of the answer, about which no opinion is expressed. But a decree of foreclosure may still be given for the complainant, and the proceeds of the sale of the land applied to the payment of the bond for the balance of the purchase-money that may be found to be due and unpaid.

The proofs do not sustain the allegation, that there has been a material alteration in the assignment made by Ewing and his wife, as the representatives of Matheson, on the back of the bond. The supposed alteration is not such an one as would vitiate the assignment, even were it admitted. But it is neither admitted nor sufficiently proven. Ewing and his wife were both competent witnesses to this fact, and as they were not examined, there is no evidence before the court which would justify such a conclusion.—2 Parsons on Contracts, (5th ed.) pp. 720, 721. The mere



fact that the words "administrator" and "administratrix" were added to the names of Ewing and wife in a different hand-writing and with a different pen and ink, where these words occur in the indorsement on the bond, is not enough, without further proof, to establish the fact of alteration in the indorsement after it was made. This could not be regarded as a material alteration of such an indorsement, and might have been made at the instance of all the parties to the instrument. And this court is authorized so to infer this, unless there is proof to the contrary. The evidence of Alexander Matheson rather sustains this view of the case than contradicts it.

The debt in the bond became due as soon as it was ascertained that the title to the land would not fail. This event was supposed to rest upon the fact of the institution and event of a certain suit against the intestate, Haddock. The bill alleges that the title to the lands was good and legally sufficient. This is not denied. It is also alleged that the apprehended suit would never be brought. This is not met by any such denial as to leave any reasonable suspicion on the mind of the court, that there is any one in existence who is likely to institute such suit, or that there is any danger to the title from this source. I therefore think that the suit was not prematurely brought, and that the bill ought not to have been dismissed.

The decree of the court below is therefore reversed, and cause remanded for further proceedings in the chancery court, in conformity to this opinion, and appellee Nicholson, administrator of Haddock, will pay the costs of this court and of this appeal in the court below.

SOUTHERN EXPRESS COMPANY *vs.* CAPERTON.

[ACTION AGAINST EXPRESS COMPANY, AS COMMON CARRIER, FOR DAMAGES  
FOR FAILURE TO DELIVER MONEY PACKAGE.]

1. *Consignee, presumption of ownership; prima facie only, and may be rebutted.*—The consignee is the person *prima facie* entitled to sue a common carrier for loss of property, but this presumption may be rebutted by proof
2. *Same; who may sue in his own name, on contract with carrier.*—One who has a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement, may support an action, in his own name, on the contract.
3. *Common carrier, stipulation by; what is unreasonable and inoperative.*—A stipulation in a receipt given by a common carrier, that it should not be liable for loss of a package of money unless a claim for the loss was made within 30 days from the date of the receipt is unreasonable, and tends to fraud, and is inoperative. *Quere.*—Whether a printed blank receipt, containing restrictions of his responsibility, and to be used generally, filled up by the common carrier and given to a party sending goods, is a special contract?

APPEAL from Circuit Court of Jackson.

Tried before Hon. W. J. HARRALSON.

The facts of this case are sufficiently set out in the opinion.

The complaint was as follows:

"The State of Alabama,	}	Circuit Court,
Jackson county.		Fall Term, 1867.

"Adam H. Caperton, plaintiff, *vs.* The Southern Express Company, defendant.

"The plaintiff claims of the defendant, a body corporate, chartered by the State of Alabama, one thousand dollars as damages, for the failure to deliver certain moneys, viz: eight hundred dollars in current national bank-notes and treasury-notes issued and circulated as money, by authority of the United States, received by said defendant as a common carrier to be delivered to S. R. Cruse at Hunts-

ville, Alabama, for a reward, which said defendant failed to do."

WALKER & BRICKELL, for appellant.

BEIRNE & GORDON, for appellee.

B. F. SAFFOLD, J.—This suit was brought by the appellee against the appellant to recover damages for the non-delivery of a package of \$800 which the defendant, as a common carrier, undertook to carry from Stevenson to Huntsville, and there to deliver it to S. R. Cruse.

The receipt given for it by the agent of the defendant, amongst other restrictions limiting the responsibility of the defendant, specified that there should be no liability for any loss, unless the claim therefor should be made in writing at the office of the company, at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. This receipt was signed by the agent, for the company, alone.

The only controversy about the facts necessary to sustain the complaint was in reference to the right of the plaintiff to sue, and his non-compliance with the terms of the receipt respecting the claim for loss within thirty days.

The evidence on these two points was, that the money belonged to the Memphis & Charleston Railroad Company, of which the plaintiff was the agent. The package was consigned to the treasurer of that company. The receipt of the defendant's agent at Stevenson was the plaintiff's voucher in the settlement of his accounts with the railroad company. The plaintiff was dismissed from the service of the company in 1866, and was refused by it any credit for the receipt of \$800. He was not informed until April, 1867, that the package had not been delivered. He made no demand for the money at all on the agent of the defendant at Stevenson, but wrote to its general superintendent at Atlanta in June, 1867. The receipt was dated March 3, 1866. The suit was commenced in August, 1867.

Exception was taken to a charge of the court, that if the plaintiff made a demand for money within a reasonable time after he was informed of its loss, the verdict must be



in his favor; and to a refusal to charge, 1st, that if the jury believed the evidence, they must find for the defendant; 2nd, that the plaintiff was not entitled to recover unless he had, within thirty days from the date of the receipt, made a statement in writing of the loss of the money as specified in the receipt.

In cases like this the consignee is *prima facie* the person entitled to sue, but this presumption may be rebutted by proof. The party only in whom the legal interest is vested can maintain an action for an injury to property. *Jones v. Sims & Scott*, 6 Porter, 138; *Barrett v. Rogers*, 7 Mass. R. 297. But one who has a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement, may support an action in his own name on the contract.—Angell on Carriers, §§ 491, 492. The proof respecting the plaintiff's interest was not such as would have justified the court in charging that he could not recover.

By the common law, the loss of the goods fixed the liability of the carrier in every instance except the act of God, or of the public enemy. He can not now avoid this responsibility by any mere general notice. The extent to which he may protect himself by special contract is by no means settled. He can not, in this State, contract for exemption from liability for damage caused by the negligence, willful default, or tort, of himself or his servants, and the burden of disproving these is upon him.—*M. & O. R. R. Co. v. Jarboe*, 41 Ala. 644; *Same v. Hopkins*, *ib*; *M. & W. P. R. R. Co. v. Edmonds*, *ib*. 667; *Steele & Burgess, v. Townsend*, 37 Ala. 247. This disability is imposed on him on account of his public character, the necessity the people are under of dealing with him, and the manifest injustice of allowing him to carry on a lucrative trust business, free from the ordinary responsibility of other employments.

For the same reason, he can not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud. Thirty days might elapse before the consignee became aware that anything had been consigned to him, especially if he was absent from home.

It was the duty of this defendant to deliver this package to Mr. Cruse, and it is more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that, too, under the protection of a writing signed only by its agent, the assent to which, by the other party, is only proven by his acceptance of the paper.

*Quere*, whether a printed blank receipt containing restrictions of his responsibility and to be used generally, filled up by the carrier, signed by him alone, and given to a party sending goods, is a special contract?

There was no error in the charge given, or in the refusal of the court to give the second one excepted to.

The judgment is affirmed.

NOTE BY REPORTER.—At a subsequent day of the term, Messrs. Walker & Brickell, attorneys for appellant, petitioned for a rehearing. Accompanying the petition was an elaborate argument dwelling, among other things, specially upon the fact that there was no averment of ownership in the plaintiff, in the complaint, and that the very point contended for had been settled in favor of appellant in the case of *M. & W. P. R. R. v. Edmonds*, 41 Ala. 667.

The following response was delivered thereto, at the June term, 1870, by

SAFFOLD, J.—The chief ground stated for a rehearing, not sufficiently considered in the opinion, is that the plaintiff was the consignor, and the complaint does not aver ownership in him. This objection ought to have been taken on demurrer, when the complaint might have been amended. If it was intended to take advantage of it by the charges asked, it ought to have been clearly expressed, so that the amendment might even then have been made. The complaint contains a substantial cause of action. The evidence showed an interest in the plaintiff which entitled him to sue. The judgment can not now be set aside.

A rehearing is denied.

## BATTLE vs. WEEMS.

[ACTION, UNDER THE CODE, BY INDORSEE AGAINST THE INDORSER OF BILL OF EXCHANGE.]

1. *Complaint; form of, as prescribed by Code, when sufficient.*—In an action by the indorsee of a bill of exchange against the indorser, a complaint that substantially conforms to the form of a complaint, in such a case, must be held to be a good complaint, whether the bill be or be not payable at a particular place.
2. *Same; plea, what is good in such case.*—In such a case, a plea that states that the bill was drawn and indorsed by the defendant for the accommodation of the acceptors, and without consideration, and was at the same time delivered to the acceptors, and that the plaintiff acquired the bill after maturity, and that at the maturity thereof the acceptors were indebted to the defendant in a sum larger than the amount due on the bill, is a good plea. Such facts, if true, are sufficient to overcome the presumption that the plaintiff is a *bona fide* holder for value—and to entitle the plaintiff to a recovery he must show when he acquired the bill, and that he is a *bona fide* holder for value, and without notice, &c.
3. *Same; evidence, what error to exclude on plea of NON ASSUMPSIT with leave, &c.*—On the trial of such a case, on the plea of *non assumpsit*, with leave to give in evidence any matter that may be a defense to the action, if the court excludes evidence, which, with other evidence that is admitted, tends to show that the defendant has a good defense for the reason that the plaintiff, as to him, is not a *bona fide* holder of the bill, for value, it is an error for which the judgment will be reversed and the cause remanded.
4. *Charge to jury; what erroneous.*—On the trial of such a case a charge of the court to the jury, that if they believe the evidence, the plaintiff is entitled to recover, is erroneous, when the evidence tends to show that the bill was drawn and indorsed without consideration, and that the plaintiff acquired it after dishonor.
5. *Same; when only such charge should be given.*—Such a charge should never be given, except in a very clear case—a case free from all doubt—inasmuch as it may encroach upon the province of the jury.

APPEAL from the Circuit Court of Macon.

Tried before Hon. J. McCaleb Wiley.

The facts of the case are sufficiently stated in the opinion.



WATTS & TROY, and F. S. FERGUSON, for appellant.  
CLOPTON & LIGON, *contra*.

PECK, C. J.—In an action by an indorsee against the drawer or indorser of a bill of exchange for non-payment, no recovery can be had without showing that the bill was presented for payment, at maturity, or due diligence used for that purpose, and timely notice of its dishonor given to them, or some legal excuse shown, why such notice was not given.—Story on Bills, §§ 323, 326; *Roberts v. Mason*, 1. Ala. Rep. 373; *Irvine, Adm'r, v. Withers*, 1 Stewart, 234.

If the bill is payable at a particular place, presentment for payment must be at such place.—Story on Bills, § 355.

These general principles are not gainsaid by either party, but the appellant, who was defendant in the court below, insists that the complaint is insufficient, in not averring a presentment for payment, at maturity, at the place the bill was made payable, "the agency of the Union Bank, Columbus, Georgia," and the question was made, in the circuit court, by a demurrer to the complaint for this cause. The complaint is as follows: "The plaintiff claims of the defendant thirty-three hundred and sixty dollars, due by a bill of exchange drawn by him, on the 4th day of February, 1861, on Dillard, Powell & Co., for the payment of thirty-three hundred and sixty dollars, to the order of defendant, at the agency Union Bank, Columbus, Georgia, twelve months after the date thereof, and by him indorsed to the plaintiff; and the said bill not being paid at maturity, was duly protested, of which the defendant had due notice; the said bill, with the damages and interest thereon, is still unpaid."

This complaint substantially conforms to the second precedent of complaints given in the Revised Code, on page 673.

Judged by the common law rules of pleading, this form can hardly be considered a good declaration, whether a bill be, or be not, payable at a particular place. But the legislature, as it had an undoubted right to do, has greatly modified and simplified the laws of pleading, and having given a form for a complaint in an action by the indorsee against

the indorser of a bill of exchange, a complaint that conforms to the precedent given, must be held sufficient. The form says, "and the said bill not being paid at maturity was *duly protested*, of which the defendant had due notice."

We, therefore, hold, that the words "duly protested" must, under the modification of the law on this subject, be considered equivalent to an averment that the bill was presented at maturity, at the place of payment named in it; otherwise, it could not be said that the bill was duly protested. For these reasons, we think there was no error in overruling the demurrer to the complaint.

2. The court, however, erred in sustaining the plaintiff's demurrer to the defendant's fifth plea. This plea states, in substance, that the bill was drawn and indorsed in blank, for the accommodation of the acceptors, Dillard, Powell, & Co., and without consideration, and being so drawn and indorsed, was, at the time, delivered to the acceptors; and further, that the plaintiff never became the owner thereof until after its maturity, and that then, the acceptors were indebted to the defendant in the sum of five thousand dollars.

These statements, if true, show, *prima facie*, a good defense to the plaintiff's action. He should not, therefore, have demurred to the plea, but if he had any matter in avoidance, he should have replied.

After the demurrer to this plea was sustained, the bill of exceptions states, that the parties went to trial, on the plea of non-assumpsit, with leave to the defendant to prove, under said plea, any matter that would be a defense to the action.

On the trial, the plaintiff introduced the bill of exchange and the protest attached thereto, copies of which are made parts of the bill of exceptions. The protest shows that the bill, at maturity, was presented for payment, at the place of payment named in the bill, and that payment was refused, and, thereupon, it was protested, at the request of one H. H. Epping, agent, that notice of non-payment, on the same day, was given to the drawer and indorser, said C. A. Battle, by depositing a notice in the post-office, directed to him at Tuskegee, Alabama. The plaintiff proved

that Tuskegee was the place of defendant's residence at the maturity of the bill, and that the interest of the State of Georgia was seven per cent. This was all the evidence on the part of the plaintiff.

The defendant, then, under the plea of non-assumpsit, with leave to give any matter in evidence that would constitute a defense to the action, proved that said bill of exchange was drawn and indorsed in blank, in the State of Alabama, purely for the accommodation of the acceptors, (who were living and doing business in Columbus, in the State of Georgia,) without any consideration between them, and to enable the acceptors to raise money on the said bill; that said bill of exchange, when thus drawn and indorsed, was left in the hands of said acceptors by the defendant.

He also proved, that said H. H. Epping, named in the protest, was, at the maturity of said bill, the agent and officer of the said Union Bank, located in Georgia; that the acceptors were doing business as commission merchants, in Columbus, in the State of Georgia, at the time of the drawing and indorsing of the said bill of exchange, and at the maturity thereof.

He also further offered to prove, that before, and at the maturity of said bill of exchange, the said acceptors were indebted to him, the defendant, in a large sum of money, as much as five thousand dollars, and that this indebtedness remained unsettled at the time of the trial. To this evidence, the plaintiff objected, and the objection was sustained, and the evidence, thus offered, excluded, and the defendant excepted.

The evidence offered, and excluded by the court, on the objection of the plaintiff, should have been admitted. With the other evidence, it tended to show that the plaintiff was not a *bona fide* holder of the bill, and, therefore, to rebut the presumption that ordinarily prevails, that an indorsee of a bill of exchange is to be considered a holder for value.

On the evidence here set out, which the bill of exceptions says, was all the evidence in the case, the court, at the instance of the plaintiff, charged the jury, that if they believed the evidence, the plaintiff was entitled to recover



the amount of the bill, five per cent damages, and interest to the day of trial. To this charge the defendant excepted.

This charge was clearly wrong. Such a charge should rarely be given—never, except in a very clear case. Such a charge is too apt to interfere with the province of the jury. On the evidence given, and that improperly excluded, we think the verdict should have been for the defendant.

In the ordinary course of things, the holder of a bill of exchange is presumed to be, *prima facie*, a holder for value; and he is not bound to establish that he has given value for it, until the other party has established the want, or failure, or illegality, of the consideration.—Story on Bills, § 193.

When the drawer of a bill of exchange has proved that it was procured by fraud, or that there was a want or failure of consideration, the presumption that the indorsee paid value for it, is overcome, and it is, then, incumbent on him, to prove that fact before he can claim the protection which the law gives to an indorsee for value, without notice.—*Ross v. Drinkard*, *Adm'r*, 35 Ala. Rep. 434-441.

The evidence in this case, with that excluded by the court below, we think, tended very strongly to show, that the plaintiff did not acquire the bill, in the ordinary course of business, before maturity, for value, and without notice.

The presumption, therefore, that ordinarily prevails, in such cases, was overcome, and cast upon the plaintiff the burthen of showing that he was a *bona fide* holder of the bill, for value, and without notice.

Without such proof, he must be held to have taken the bill, subject to all its infirmities—all the defenses and equities that existed against it.

For the errors in sustaining the demurrer to the fifth plea, and in rejecting the evidence offered by the defendant, and objected to by the plaintiff, and, also, in the charge given to the jury, the judgment is reversed and cause remanded, at the costs of the appellee.

LEONI *vs.* THE STATE.

## [INDICTMENT FOR RAPE.]

1. *Indictment for rape; what need not charge.*—An indictment for rape, under the form in the Revised Code, is good. In such an indictment, it is not necessary to charge that the carnal knowledge of the female was “against her will.”
2. *Same; what evidence not admissible as evidence of guilt on trial of.*—On the trial of an indictment for rape, it is proper to prove what complaint was made by the prosecutrix, and in support of such proof, the testimony of a witness, to whom complaint was made, as to how, when, where, and what complaint was made, was rightfully admitted; but where the guilt of the accused depended solely upon the evidence of the prosecutrix, the testimony of a witness as to prosecutrix’s showing witness a garment with blood and mud upon it, which prosecutrix said was worn by her at the time of the rape, (the witness not knowing any fact about the garment having been worn as stated, nor connecting it with any fact known to the witness as pointing to the guilt of the defendant,) although a part of the complaint, and for that purpose admissible, when so limited, was not evidence of guilt, but mere hearsay, and should have been rejected as proof of guilt.
3. *Punishment; when leaving to jury to fix, is error.*—When it is made by law the duty of the court to fix the punishment on conviction of an offense, and the court leaves it to the jury to fix such punishment, it is such an error as will work a reversal of the conviction and sentence.
4. *Charge to jury; what erroneous, on trial for rape.*—A charge to the jury, that “if the testimony of the prosecutrix, as to the guilt of the prisoner, is sufficiently clear and explicit to convince your minds, beyond a reasonable doubt, of the prisoner’s guilt, then you would be authorized to convict upon *her testimony alone*; but if you have any doubts of the prisoner’s guilt, *upon her evidence*, then you must enquire whether her evidence has any support,” in such a case as this, where such support can come only from the testimony of witness, who is impeached, and who knows nothing of the commission of the offense, except from hearsay, is calculated, unnecessarily, to violate that great care and caution so essential in determining the guilt of an accused, on a charge of rape. (PECK, C. J., *not concurring in the criticism on the charge.*)

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The facts upon which the case turns are sufficiently set out in the opinion.

ALEX. MCKINSTRY, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—On the 12th day of June, 1869, Gaetano Leoni, the appellant, was indicted, in the city court of Mobile, for rape on Elizabeth Lazzaro. The indictment was in the following words :

“The State of Alabama,            }  
  }   City Court of Mobile.  
  }   June Term, 1869.  
  }   Mobile county. }

“The grand jury of said county charge, that, before the finding of this indictment, Gaetano Leoni forcibly ravished Elizabeth Lazzaro, a female, against the peace and dignity of the State of Alabama.”

This cause came on to be tried at the fall term of said court, in the year 1869, when the said defendant, Leoni, demurred to said indictment, and for cause, showed that it was not alleged in said indictment, that the act of carnal knowledge of her (said Lazzaro) “was against her will.” This demurrer was overruled by the court. Thereupon the defendant went to trial, with a jury, upon the plea of not guilty, was convicted of an assault, with intent to ravish the said Elizabeth Lazzaro, and sentenced to five years imprisonment in the penitentiary. From this sentence he appeals to this court.

In such a case, it is the duty of this court to “render such judgment on the record as the law demands.”—Rev. Code, § 4314.

On the trial below, the defendant made several objections to the rulings of the court, which were reserved in a bill of exceptions.

There was no testimony for the State before the jury, except that of the prosecutrix, which tended to establish the charge. Mrs. Norsano was examined for the prosecution, but she testified only to such facts as the girl Lazzaro had told her. Mrs. Norsano’s testimony was not such as could have been the grounds of a conviction, had it been true, and upon her examination before the committing magistrate and the court, she made a very serious mistake in the time at which it occurred. She was mistaken, or she



was untruthful. She explained her mistake by saying that she was a foreigner, and did not very well understand the language. There is no language spoken in the city court of Mobile in which the 29th day of December and the 26th day of November are the same. Yet Mrs. Norsano said upon her examination before the magistrate in May, that the occurrences which she detailed had happened on the 29th day of December, and before the court she said the true date was the 26th day of November.

In her testimony, Mrs. Norsano says the girl Lazzaro asked her upon one occasion, if she and Mrs. Leoni had not been talking about her, (said Lazzaro,) and she told her, in reply, that they had, and that Mrs. Leoni had said she was a bad girl, and alluded to her staying at night under the house. Then the prosecutrix told her that the defendant had dragged her under the house and forced her. She then showed bruises on her arms and legs, but it was doubtful whether they had been occasioned by her father's whipping her, or by the defendant. In the same conversation, the prosecutrix exhibited to her an undergarment with stains of mud and blood upon it, which she (Lazzaro) said she had on when she had been with Leoni under the house, but she did not have it on when it was exhibited, nor did Mrs. Norsano know that she had then worn it. This testimony in relation to the garment and all the statements about its appearance, the defendant, after cross-examination about it, moved to exclude. This motion was refused, and the refusal was reserved in the bill of exceptions. The girl Lazzaro had mentioned this circumstance of the exhibition of her garment to Mrs. Norsano on her direct examination.

It was proper for the girl to make complaint, (1 Russ. Cr. 688, 689); and it was competent for Mrs. Norsano to prove what this complaint was, and how and when it was made. In this view of the evidence, the garment was a part of the complaint, but it was not evidence of the defendant's guilt, as it was not connected with any fact known to Mrs. Norsano that pointed to guilt. As an evidence of guilt, by Mrs. Norsano, it was merely hearsay. And for this purpose it ought to have been rejected, as an evidence

of guilt. But as the objection was general, and it was competent to prove the complaint and its character, it ought not to have been rejected, as it was allowable for this purpose, when so limited.

The testimony of the prosecutrix, upon whose evidence the whole case turns, is not free from grave suspicion of a want of truth and fairness. She is shown to be a woman without virtue, and her testimony is contradicted by Forrester, and by Aronne and Legalla, and by the good character of the defendant; and her complaint shows, that after staying an hour and a half under the house with Leoni, she made no out-cry about it until the third day afterwards, and then only in vindication of herself against Mrs. Leoni's suspicions that she was a bad girl.— *The People v. Hulse*, 3 Hill, 309.

Under such a state of testimony, the charge was unfair and calculated to mislead, in a case of this character. The charge of the court was calculated, and apparently intended, to rest the case wholly upon the testimony of the prosecutrix. This was a violation of the important caution, so emphatically insisted on, by Lord Chief-Justice Hale. He says it should always be remembered, "that this is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." And this, he thinks, occurs from the hateful nature of the offense, which "many times, transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of a malicious and false witness."—1 Hale P. C. 635, 636; 1 Russ. Cr. 190, 191, marg.

That portion of the charge of the court which is here urged to be improper, is in these words:

"If the testimony of the prosecutrix as to the guilt of the prisoner is sufficiently clear and explicit to convince your minds beyond a reasonable doubt of the prisoner's guilt, then you would be authorized to convict upon *her testimony alone*; but if you have any doubt of the prisoner's guilt, upon *her evidence*, then you must enquire whether her evidence has any support."

Such a charge, in such a case, upon such testimony, by such a witness, is calculated, unnecessarily, to violate the great caution above insisted upon.

But besides this, it was left to the jury to fix the length of the period of imprisonment in this case, and the judgment of the court followed the verdict. This the court had no authority to do. It is not for this court to enquire whether there was good reason for this or not. It is a positive rule of law. The courts can not properly know any other, else they make reason take the place of the law. The legislature has the sole power to direct the courts in what manner they shall proceed in the trial of a cause. When this is done, their direction becomes the rule which forms a part of the "due course of law," which it is the right of the defendant to have administered. It becomes the way, and the only way, unless the legislature has enlarged it with exceptions. The court can not substitute its reason for the law. Reason ceases to be the guide when the law is known. It is only when the law is uncertain, that "right and justice" become the rule. Then reason may aid in the search after these.—Revised Code, §§ 3670, 3806.

The indictment is sufficient.—Rev. Code, § 4141, p. 808, No. 7.

The verdict of the jury shows that it was a compromise. If the testimony of the prosecutrix was believed, the defendant was guilty of rape. If it was not truthful in the higher degree, it was equally untruthful in the lower. Such verdicts are not to be encouraged.

Let the judgment and conviction of the court below be reversed, and the cause remanded for a new trial. And in the meantime, the defendant, said Gaetano Leoni, will be held in custody until discharged by due course of law.—Revised Code, § 4316.

PECK, C. J., concurred in the judgment of reversal, but did not concur in the criticism on the charge to the jury, cited in the opinion. He thinks the charge proper, but that it was not proper to leave the fixing of the period of confinement to the jury.



BURCH *vs.* CARTER ET AL.

[BILL IN EQUITY TO SET UP AND ENFORCE VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY OF LAND.]

1. *Vendor, lien of; against whom exists.*—The lien of the vendor, for the purchase-money of real estate, exists against the vendee and against volunteers and purchasers under him, with notice, or having an equitable title only.
2. *Same; against whom does not exist.*—But the lien does not exist against purchasers under a conveyance of the legal estate, made *bona fide* for a valuable consideration, without notice, if they have paid the purchase-money.
3. *Same; purchaser, what chargeable with notice of.*—The purchaser is chargeable with notice of every thing that appears on the face of the deeds in the chain of his title, but he is not bound to enquire into collateral circumstances.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. N. W. COCKE.

This was a bill in equity filed by Eliza J. Burch, the appellant, against the appellees, seeking to set up and enforce a vendor's lien on certain land described in the bill, for the unpaid purchase-money thereon.

The land in question was sold by the appellant, Mrs. Eliza J. Burch, in 1859, to one of the appellees, A. J. Burch; Mrs. Burch, giving a warranty deed in fee to the purchaser, and the purchaser giving his note for the purchase-money. In 1860, the appellee, Burch, who was then in possession, sold the lands in controversy to his co-appellee Carter, who paid for the land at the time of the sale, receiving from A. J. Burch a warranty deed in fee to said lands. The bill alleges notice on the part of Carter, before paying the purchase-money, of the lien of appellant.

The defense set up, by the appellee, Carter, is that he is a *bona fide* purchaser of the land, for a valuable consideration, without notice of appellant's lien.

The cause was submitted for decree, on bill and answer, and the testimony. The chancellor dismissed the bill and

taxed appellant with costs. The proof as to the notice on the part of Carter, and other facts of the case, will be found in the opinion.

The decree of the chancellor is now assigned for error.

WATTS & TROY, for appellant.

ELMORE & GUNTER, *contra*.

B. F. SAFFOLD, J.—The matter of difficulty in this case is a question of fact, rather than of law.

The lien of the vendor exists against the vendee and against volunteers and purchasers under him with notice, or having an equitable title only.—*Burns v. Taylor*, 23 Ala. 255; Story's Eq. Jur. vol. 2, § 1225. But it does not exist against purchasers under a conveyance of the legal estate made *bona fide*, for a valuable consideration, without notice, if they have paid the purchase-money.—Story's Eq. Jur. vol. 2, § 1228; Sugden on Vendors, ch. 12, § 3, p. 557; *Mackreth v. Symmons*, 15 Vesey, 336; 6 John's Ch. R. 402, 403.

The defendant, Carter, pleads that he is a *bona fide* purchaser, for valuable consideration, without notice, from his vendor A. J. Burch, who was seized in fee, and was in possession of the land in question at the time of the sale and conveyance to him, and that he paid the purchase-money before notice. If the facts sustain this plea, the complainant has no cause of action against him. The only part of the plea controverted is whether he is a purchaser without notice.

The proof on the part of the complainant is—1st, the testimony of Simmons that he twice told the defendant the purchase-money had not been paid to Mrs. Burch and his reply each time, "I reckon there will be no danger;" 2d, the testimony of Lyde that the complainant and himself were present when A. J. Burch handed his deed for the land to the defendant Carter, and received from him checks for the purchase-money; that as soon as Burch received them he, Burch, turned to the complainant and said, "when I draw the money on these checks I will go to your house and make the first payment on the land."

For the defendant there is—1st, his own testimony that neither Simmons nor any one else, told him, before he had paid A. J. Burch, that the purchase-money had not been paid to the complainant; that A. J. Burch had told him it had been paid, and he did not know to the contrary; 2nd, the testimony of A. J. Burch, that at the interview mentioned by Lyde, he did not hear any one tell the defendant the complainant had not been paid; 3d, the deed of complainant reciting the receipt of its consideration, and the possession of A. J. Burch; 4th, the silence of complainant when she saw A. J. Burch selling the land to the defendant, and receiving from him checks for the purchase-money.

There is direct conflict between the evidence of Simmons and of Carter. Simmons is the friend and agent of the complainant, and is not interested. Carter is interested, but unimpeached. At the meeting mentioned by Lyde, Carter may not have heard the remark of A. J. Burch to the complainant, that he would make her the first payment on the land, or he may not have understood, that he was referring to this land; the land bought by Carter from A. J. Burch not being all the land which was purchased by Burch from complainant. The complainant's silence on the occasion is very expressive of acquiescence in what was being done.

The absence of all motive on the part of Carter for taking such a risk, as he would have done if he knew the complainant had not received payment, is at least an argument in favor of his want of knowledge.

If the weight of evidence is not on the side of the defendant, it is very evenly balanced, and the burden of proof is on the complainant.—*Conner v. Tuck*, 11 Ala. 794; *Mason v. Peck*, 7 March, 301; *Roberts v. Salisbury*, 3 Gill & J. 425. The vendor's lien, though fully recognized in this State, is a secret trust, exhibiting little, where a conveyance is made, to put a subsequent purchaser on inquiry. The defendant is a purchaser with notice of everything that appears on the face of the deed in the chain of his title, but he is not bound to inquire into collateral circumstances.—*Attorney-General v. Backhouse*, 17 Vesey, 282.

The decree of the chancellor is affirmed.



NOTE BY REPORTER.—The foregoing opinion was delivered at the June term, 1869, and at a subsequent day of the term, appellant applied for a rehearing. The application was held under advisement until the present term, when the following response was made thereto :

B. F. SAFFOLD, J.—The testimony in this case has been carefully reviewed. The evidence of two witnesses tends to the proof of notice to the subsequent purchaser, Carter. Simmons testifies positively that he told him twice, that Mrs. Burch had not been paid. Lyde testifies that in the presence of Carter, A. J. Burch told Mrs. Burch, when he collected the money to be paid him by Carter, he would make her the first payment on the land. This is all of the appellant's testimony on that point.

On the part of the appellee, Carter, he himself was examined, and he swears positively that Simmons did not tell him Mrs. Burch had not been paid until several months after he had purchased and paid for the land ; that no one else told him anything about it, and he did not know it. His testimony opposes that of Simmons in every particular. He is a competent witness, and if so, there is no reason why his interest in the suit should alone discredit him. If Lyde's testimony stood unaffected by any other, it would be difficult to say that the declaration of A. J. Burch to Mrs. Burch, " when I collect the money on these checks I will make you the first payment on the land," made in the room where Carter was, should charge him with notice. Lyde does not say Carter heard the conversation. He does not say he might have heard it. Can it be concluded that Carter did hear it, and did understand it to refer to the land he had just paid A. J. Burch for? A. J. Burch does not say that such a conversation took place, and Mrs. Burch is not examined at all. Both of them could have proved it, if it occurred. As Mrs. Burch had made a deed of the land to A. J. Burch, the burden of proving notice was on her. To reverse the decision of the chancellor on a question of fact the weight of evidence should be decidedly in favor of the appellant. Our opinion

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still is, that the evidence is very evenly balanced, if not in favor of the appellee.

A rehearing is denied.

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BIBB & FALKNER, EX'RS, *vs.* COURT OF COUNTY COMMISSIONERS.

[APPEAL FROM ORDER REFUSING MANDAMUS.]

1. *Mandamus ; when will be denied.*—An application for a *mandamus* to compel a court of county commissioners in this State to provide a fund, by taxation or otherwise, to pay debts contracted during the late rebellion to feed and support the families of Confederate soldiers, will be denied. (SAFFOLD, J., *dissenting*.)
2. *War debts ; what are, within the spirit and policy of ordinance No. 37 of the convention of 1867.*—Debts so contracted are war debts, within the spirit and policy of ordinance No. 37 of the convention of 1867, and therefore void. They are also void, as debts contracted in violation of the laws and policy of the United States. (SAFFOLD, J., *dissenting*.)

APPEAL from the Circuit Court of Chambers.

Tried before Hon. LITTLEBERRY STRANGE.

This was an application by the appellants, as executors of the last will and testament of W. B. S. Gilmer, deceased, to the circuit court of Chambers county, to compel the court of county commissioners of said county of Chambers, to levy a tax to pay certain warrants, issued by said court of county commissioners during the years 1862–3–4, the property of their testator. The relators, in their petition, aver that said warrants were issued, in payment of money loaned by their testator to said court of county commissioners, to enable it “to purchase food, provisions and supplies for the poor, and for persons in needy and indigent circumstances in said county, and for money advanced by their testator in the purchase of orders and warrants issued by order of said court of county commissioners, for the

same purpose, in favor of other persons, all of which demands or claims on said county, are duly audited and allowed by said court of county commissioners, and warrants duly issued therefor, for the payment of the same, as charges on the county treasury of such county." Petitioners further show, that "there was, from the beginning of the year A. D. 1862, up to the close of the year 1864, a war going on between the United States and several of the Southern States, and a large number of citizens of said county had gone off out of said county and engaged as belligerents in said war, and had left their families in he'pless and destitute circumstances, and without the means of subsistence; under which circumstances it became, and was the duty of the court of county commissioners of said county to make provisions for their support and maintenance, &c.; that there was not sufficient funds in the county treasury, at the time said debts were contracted, for said purpose; that the court of county commissioners, who were then acting for said county as commissioners, contracted the debts mentioned in the warrants, for the support of indigent persons in said county, in good faith and solely for the purpose of supporting the indigent in said county, large numbers of whom absolutely needed subsistence, &c.; that the money loaned, &c., was loaned in good faith by their testator, at the request of the persons then acting as court of county commissioners, and upon the faith and credit of said county," &c.

The warrants referred to, fourteen in number, are all set out in the transcript and made a part of the petition. As appears from the face of the warrants, three of them were issued "for provisions furnished the families of indigent and absent soldiers," eight others "for provisions furnished the families of absent soldiers," two warrants were issued "for money loaned for the use of families of absent soldiers," and the remaining warrant was "for cash loaned the county, with interest from date."

The petitioners then show a presentation and registration of said warrants, as by law required, and also a second time, in accordance with a requirement of said court of county commissioners, in reference to claims arising



during the war, and a refusal of the county treasurer to pay the same, and a refusal on the part of the court of county commissioners to provide in any manner for the payment, or allowance, of said claims.

The relation was demurred to—1st, because the commissioners court had no authority to borrow money; 2d, because the relation shows no legal liability against the county; 3d, because the relation shows an illegal consideration.

The court sustained the demurrer, and taxed relators with costs, and its action is now assigned for error.

FALKNER & MOLTON, for appellants.

C. D. HUDSON, and G. W. GUNN, *contra*.

PECK, C. J.—We think it manifest, from the whole scope of the petition to the court below, that the debts, alleged to have been contracted by the court of county commissioners of Chambers county, were contracted with appellants' testator, in the years 1862, 1863, and 1864, during the progress of the late rebellion, to obtain provisions, and otherwise to provide for the families of soldiers, in the service of the so-called Confederate States.

We hold that the appellees, the present court of county commissioners of said county, are under no legal obligation to recognize said debts, or in any way make provision for their payment.

If they are not debts embraced by the letter of ordinance No. 37 of the convention of 1867, entitled "An ordinance declaring the war debt of Alabama void," they are within the spirit and policy of said ordinance. A debt contracted to feed, or provide for the support of the families of Confederate soldiers, is as really a war debt as if contracted to feed and provide for the Confederate soldiers themselves.

But aside from said ordinance, such a debt must be held to have been contracted to aid and promote said rebellion, and therefore contracted in violation of the laws and public policy of the United States, and for that reason void.

The decision of the court below, in sustaining the de-

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murrer to the relation or petition of the appellants, filed to obtain a *mandamus* to compel the appellee, the court of county commissioners of Chambers county, to provide a fund for the payment of the debts named in said petition, by taxation or otherwise, is right, and, therefore, the judgment is affirmed, at the costs of the appellants.

B. F. SAFFOLD, J., (*dissenting*).—I dissent from the judgment of the court, in this case, for the following reasons :

The appellants applied to the circuit court, at the spring term, 1869, for a rule *nisi* to the appellee, to show cause why a *mandamus* should not issue to compel payment of certain claims against the county which accrued to their testator in the years 1862, 1863, and 1864, and to levy a tax for their payment. They allege that these claims had been audited and allowed by the commissioners court, and warrants had been issued for their payment, which are set out in the transcript; that these warrants had been presented to the treasurer of the county, and payment of them demanded and refused; that application had been made to the court to levy a tax, or make other provision for payment, which had also been refused.

This application was demurred to—1st, because the commissioners court had no authority to borrow money; 2d, no legal liability against the county was shown; 3d, the application shows an illegal consideration. The demurrer was sustained, and hence this appeal.

It must be remembered, that this cause has not been heard on its merits, and that on demurrer the facts stated in the relation must be taken as true.

Eleven of the fourteen claims are orders by the court to the county treasurer, or the probate judge, to pay the amounts therein specified, to the persons named, for provisions furnished to the families of absent soldiers. The application states, that the persons for whom the debts were contracted were indigent persons.

The second and third grounds of demurrer are not sustained by the record. It is the duty of the commissioners court to provide for the poor in the county; and also to

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audit all claims against the county. The judge of probate is required to give the holder of the claim a warrant on the treasury for the amount so allowed.—Revised Code, §§ 832, 907. The application alleges that this has been done, which establishes the existence of a legal liability.

No illegal consideration appears from the record. We can not presume that the families of soldiers relieved were those of persons in arms against the Union, or, if so, that they were ministered to because their male protectors were so engaged, without other necessity. The allegation is, that they were in destitute circumstances. It is well known that the conscription law of the Confederate States originated in dire necessity, and was executed with relentless severity. It is also true, that the more destitute portion of the people were especially its victims. The example of the Federal government, in supplying the necessities of the same class of persons, suffering from the same causes, both during and after the war, is in favor of the humanity and charity which will relieve affliction, whether imposed by misfortune or offense.

The first ground of demurrer is an objection to only a portion of the application, while it professes to answer the whole. For this reason, it ought to have been overruled. *Ferguson & Scott v. Baber's Adm'rs*, 24 Ala. 402; *Wilson v. Cantrell*, 19 Ala. 642.

As these claims ought to be paid, unless they fall under the denomination of debts contracted in aid of the rebellion, I think the rule *nisi* ought to have been granted, in order that their true character might be shown.

NOTE BY REPORTER.—At a subsequent day of the term, Messrs. Falkner & Molton, for appellants, filed a lengthy application for a rehearing, contending, among other things, that the fact that the families supported were families of absent soldiers, made them none the less indigent, nor relieved the county from the duty imposed by the statute and by humanity, of supporting indigent and needy persons and those unable to provide for themselves; that the courts must presume in favor of the innocence of parties, in the absence of proof to the contrary, and that under the



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evidence disclosed in the relation, the court, if it presumes at all, must presume that the absent soldiers were in the U. S. armies, or if not, were conscripted, or otherwise forced into the service of the Confederate States; and hence, that supporting their families was not illegal and contrary to public policy.

To this application the following response was made by

PECK, C. J.—I have carefully read and considered the application for a rehearing, and have again read the opinion of the court, delivered by me, and I remain satisfied with the correctness of the same. The present court of county commissioners are under no legal obligation to pay the debts contracted by the rebel court of county commissioners during the rebellion. The present court of county commissioners are in no legal sense the successors of the court called the court of county commissioners under the rebellion, or rebel government of this State. The rebel court of county commissioners could make no contract that can impose any legal obligation on the present court of county commissioners, or on the people of said county.

The application for rehearing is refused.

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### COLEMAN vs. HOLMES.

[ACTION ON PROMISSORY NOTE—STATUTE OF LIMITATIONS.]

1. *Statute of limitations; for what length of time suspended in Alabama.*—The statute of limitations was suspended in this State from 11th day of January, 1861, to the 21st day of September, 1865; that being the period within which no legal civil courts existed in which the people of this State were compellable to have their causes adjudicated. (PETERS, J., *dissenting*.)

APPEAL from the Circuit Court of Henry.  
Tried before Hon. J. McCaleb Wiley.

The appellant sued the appellee on the 10th of September, 1868, on a promissory note which was due the 1st day of January, 1861. The defendant pleaded the statute of limitations of six years, and upon this plea issue was joined. The note being the only evidence in the case, the court instructed the jury to find for the defendant, and the plaintiff excepted, and now assigns the charge of the court for error.

Section 2 of ordinance No. 5, of the convention of 1865, adopted 21st September, 1865, is as follows: "Section 2. In computing the time necessary to create the bar of the statutes of limitations and non-claim, the time elapsing between the 11th day of January, 1861, and the passage of this ordinance, shall not be estimated."

The legislature repealed this section of the ordinance, by the act of December 4th, 1868, which, after repealing said section, enacts that it "shall have no effect on any debt or claim, just as if it had never been in force, any law to the contrary notwithstanding."—Acts 1868, p. 391.

W. C. OATES, for appellant.

J. A. CORBITT, *contra*.

B. F. SAFFOLD, J.—Statutes of limitation are serviceable, for the protection of debtors against stale demands, in discouragement of the *laches* of creditors, to restrain litigation, and for the purpose of quieting titles and giving proper latitude to the disposition of property. They are said to affect the remedy and not the debt in actions *ex contractu*, but in reference to property, the prescription completed vests the title, extinguishing the adverse right as well as the remedy. Too nice a distinction has perhaps been made in this respect. The application of the *lex fori* to them probably originated from the principle of comity on which the courts of one nation enforced the contracts made in another. Under the restrictions of our Federal and State constitutions a statute of limitations which should not give a reasonable time after its passage for the commencement of suits upon existing causes of action, would be void.—Cooley on Const. Lim. 366. So, a subsequent

repeal of the limitation law under which title to property had been acquired could not be given a retroactive effect to disturb this title.—*Brent v. Chapman*, 5 Cranch, 358; *Leffingwell v. Warren*, 2 Black. 599; Cooley on Const. Lim. 365.

The convention of 1865 ordained that in computing the time necessary to create the bar of the statute of limitations and non-claim, the time elapsing between the 11th of January, 1861, and the passage of the ordinance shall not be estimated.—Rev. Code, p. 53; Ord. 5, § 2. The legislature, on the 4th of December, 1868, repealed this section.—Acts 1868, p. 391.

Both of these enactments, on account of their sweeping character, are amenable to one or the other of the constitutional prohibitions above referred to. It is, however, insisted, with strong array of authority to support it, that the ordinance may revive the remedy, already barred, on contracts for the payment of money, as well as efface the specified time elapsed, on those not barred at the date of its passage. I doubt the wisdom and justice of the distinction which devotes the property, undoubtedly his, of a debtor to the payment of a debt he may not owe, while it leaves a trespasser in possession of property to which, he may be willing to admit, his only title is the prescription.

It is unnecessary to determine the effect of this legislation, as the conclusion to which the court has come may be maintained on other incontestable grounds of justice and precedent.

Section 2924 of the Revised Code suspends the statute of limitations during the continuance of war between the United States and a foreign power, when either party to a contract is a subject or citizen thereof. Section 2908 deducts the period of absence from the State during which a suit might otherwise have been commenced against a party. There is no express provision of our law for a case where the courts have been interrupted by civil commotion, or for one, like this, when the rightful power had been excluded from the State by force, and another, hostile to it and insurrectionary, substituted instead. We must therefore re-



sort to analogy and a sense of justice for a proper determination of what is law.

The spirit of section 2908 is, that a party against whom a suit may have been commenced, must have been all the time within the jurisdiction of the courts of the State having cognizance of the cause of action, and not merely within the territorial limits of the State. In the case of *Smith, Adm'r, v. The Heirs of Bond*, (8 Ala. 386,) the defendant had left the State, but had returned, and resided in the Choctaw nation within the State and in what is now called Sumter county, but without the jurisdiction of the courts of the State. This court held, that the debtor, to avail himself of the lapse of time, must have been all the time within the jurisdiction of the State so that he might have been sued. In the case of *Slight v. Kane*, (1 Johns. Cases, p. 76,) the question was, whether the defendant was in the State of New York at a particular time. The portion of the State in which he was, was within the British lines during the war of the revolution. The court held, that he was not within the State within the meaning of the statute, because he was out of its jurisdiction, where the authority which was exercised was not derived from the State. No writ of the State could run there, consequently no suit could be brought against him there.

In *Hanger v. Abbott*, (6 Wall. 532,) the supreme court of the United States decided that the time during which the courts in the lately rebellious States were closed to the citizens of the loyal States, is, in suits brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suits may be brought; though exception for such cause be not provided for in the statutes. Justice Clifford delivered an elaborate opinion, which applies as fitly to this case as to that. We know judicially that at the time this note became due, and for more than four years afterwards, the courts of this State were in a position of hostility and revolt towards the United States and the Federal constitution. The courts of the rightful State government when restored, can not, with any propriety, hold a citizen bound to sue in the courts

set up by the government of force in opposition to the rightful government.

The ordinance of September 21, 1865, may be considered as a declaration by representatives of the people that the State courts, under proper authority, were again open for the transaction of business, and that the laws were taking their due course. It has been so regarded and acquiesced in by the people since that time.

We, therefore, decide that the statute of limitations was suspended in this State from the 11th day of January, 1861, the date when the relations of the State with the United States were disturbed, to the 21st day of September, 1865; that being the period within which no legal civil courts existed in which the people of the State were compellable to have their cases adjudicated.

As six years had not intervened between the maturity of the note and the commencement of the suit, after deducting the period above mentioned, the judgment of the circuit court is reversed and the cause remanded.

PETERS, J., (*dissenting.*)—The statute of limitations is a law fixing the period at the end of which no action at law or suit in equity can be maintained.—Ang. on Limit. p. 251.

All such laws, in this State, must be made by the general assembly of the State, because all the legislative power of the State is vested in that body. Such are the words of the constitution itself.—Const. of Ala. 1867, art. 4, § 1, *et seq.* There is no power in the courts to make laws, or to modify the laws enacted by the general assembly, either by their constructions or by their judgments. To do so would be an evasion of the constitution, not the construction of a statute.—Const. Ala. 1867, art. 3.

The statute law of this State upon the matter of limitations is all the law there is upon this subject. When a statute revises the common law or a former statute upon the same subject matter, the common law and the former statute both are repealed, unless there is a saving clause in the revising statute. This is a rule without exceptions.—Smith's Com. on Statutes, p. 904, §§ 786, 787, and cases

cited. Then the law, as found in the Revised Code, comprehends all the law upon the question of limitations in force in this State; except such changes as have been made since the Code was published.

So far as this case is concerned this law is in these words: "Civil suits must be commenced after the cause of action has accrued, *within* the periods prescribed in this chapter, and *not afterwards*."—Rev. Code, § 2898. And when the action is founded upon a promissory note or writing not under seal, as is the case here, the limitation is "six years," unless the case falls within some of the extensions or exceptions appended to the act in the Revised Code.—Rev. Code, § 2101, cl. 3. This language is not only direct and positive, as to the length of time necessary to elapse in order to constitute a bar, but it forbids the commencement of the suit after that time has elapsed. It defines the time precisely, and declares that no action shall be brought after that time has expired, except as stated in the act itself. The language of this act is wholly devoid of any doubt. The words are perfectly plain, and free from all ambiguity. The period of time that bars the action is six years from the day of the falling due of the note. This time can not be lengthened or shortened by the court, unless there is authority for this found in the statute itself. The statute mentions certain exceptions to the periods of limitations named in the act. These exceptions, so designated, exclude all other exceptions, upon the principle, that the thing expressed excludes the thing omitted. *Designatio unius est exclusio alterius*.—4 Coke, 80, b.; Broom's Max. 278, 279; 3 Story, 87, 89.

All the exceptions which the law permits in this State, are mentioned in the statute. Beside these, there are no others. *Expressum facit cessare tacitum*.—Smith's Com. Stat. p. 655; *Marberry v. Madison*, 6 Cranch.

Here the exception, which it is presumed suspends the statute, is the interposition of the war of the late rebellion. This is not one of the exceptions mentioned in the act. Then, with all respect for the opinion of the majority of the court, it seems to me that its introduction here is an act of legislation, and not an act of construction. It



adds a *proviso* to the act, that is not found in it, or it gives a construction to its words which they will not allow. During the rebellion, there was no "war between the United States and a foreign country;" nor was the language used intended to apply to a rebellion. This was the opinion of the convention of 1865, and that body passed an ordinance to remedy that omission.—Ordin. 1865, No. 5; Revised Code, p. 53. But this ordinance, if it was entitled to any force as a legislative act, was repealed before the trial of this cause, in the court below. The repeal destroyed its force.—Pamphlet Acts 1868, page 391, No. 28.

It is respectfully submitted, that the authorities relied on by my brothers, in the opinion and judgment of the majority of the court, are not applicable to this case. They are not founded on constructions of the law of limitations of Alabama, as it now exists. This latter is the law that must govern the judgments of the courts of this State. And constructions outside of our statute are not authorities in this court.

Most clearly, the construction I am combatting *re-instates* the ordinance of the convention of 1865, without legislative enactment; and even in the face of a legislative enactment, which plainly negatives, if it does not forbid, the above construction, by the majority of the court.

I feel unwilling to sanction such a line of argument, where there is no constitutional question involved, as it seems to me is the case in this instance. Here the statute is plain, unambiguous, and not susceptible of misapprehension. It covers the whole subject of limitations in this State. In such cases, the statute is the only law. And the extension of the period of limitation that saves this cause from affirmance is not found in it, in express terms. And it seems to me that no safe legal logic will allow its derivation from construction.

The note, here sued on, fell due on the first day of January, 1861, and the suit was not brought on it until September 10, 1868, above seven years after the action accrued. It was barred by the statute.

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I therefore think that the judgment of the court below was correct, and that the judgment should in all things be affirmed.

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### LAPSLEY vs. WEAVER.

[APPEAL FROM ORDER OF CIRCUIT COURT, DISMISSING CASE OUT OF COURT AND TAXING PLAINTIFF WITH COSTS, AFTER GRANTING A NEW TRIAL IN THE CAUSE, WHICH HAD BEEN AFFIRMED BY SUPREME COURT, ON DEFENDANT'S APPEAL.]

1. *Circuit court ; jurisdiction of.*—The circuit court, neither in vacation nor in term time, hath any power to grant a new trial, on the application of the defendant, in a cause which has been affirmed in this court, on his appeal.
2. *Same.*—If such new trial is unadvisedly granted by the circuit court, it is its duty, on motion of the plaintiff in said cause, to set aside and vacate said order granting a new trial, and to strike said cause from the docket.
3. *Appeal ; what such final judgment, as will authorize.*—If the circuit court refuses to do this, and on plaintiff's refusing to proceed further with said cause, the said circuit court thereupon dismisses said cause out of court, for want of prosecution, and taxes the plaintiff with the costs, such judgment is a final judgment, upon which an appeal may be taken to this court.
4. *Erroneous judgment, as in this case ; what directions will be given on reversal of.*—Such a judgment is erroneous, and will be reversed and remanded, with directions, to said circuit court, to set aside and vacate said order granting a new trial and to strike said cause from the docket, and to order the clerk of said circuit court to issue execution on said judgment of said court, in favor of said plaintiff, as affirmed in this court.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. B. L. WHELAN.

All the material facts of the case will be found in the opinion.

MORGAN & LAPSLEY, for appellant.

PETTUS & DAWSON, *contra*.

PECK, C. J.—At the September term of the circuit court of the county of Dallas, in the year 1867, the appellant, said Lapsley, as plaintiff, recovered a judgment in that court, for the sum of twenty-four hundred and forty-three 16-100 dollars, against the appellee, the defendant in that court. On that judgment said defendant appealed to this court, and at the June term thereof, in the year 1868, to-wit, on the second day of July of that year, said judgment was affirmed against said defendant, and judgment rendered against him, and Thomas B. Wetmore and S. N. McCraw, his sureties in said appeal, for the amount of said judgment, ten per cent damages thereon, and interest, and the costs of this court and of said circuit court.

Afterwards, to-wit, on the twenty-second day of December, in the year 1868, the judge of the circuit court of said county, in vacation, granted a new trial in said cause. After said new trial was so granted, and before further proceedings were had in said cause, in said circuit court, to-wit, at the January term of this court, in the year 18 9, the said defendant moved this court to set aside said judgment, so affirmed, &c., as aforesaid, and to grant a new trial and rehearing of said cause in this court.

This motion was denied at the costs of said defendant and his securities on his appeal bond.

After said motion, in this court, for a new trial and rehearing had been denied, to-wit, at the March term of the circuit court of said county of Dallas, in the year 1869, the said plaintiff, in said circuit court, moved said court to set aside said order, so made in vacation, &c., as aforesaid, granting a new trial in said case, and to strike said cause from the docket of said circuit court; which motion was denied.

The said court then called said cause for trial, and required said plaintiff to state whether he was ready for trial. Said plaintiff, relying upon his said judgment, as affirmed in this court, declined further to proceed in said cause in said circuit court, because the same had been finally settled and disposed of in this court, and affirmed, &c., as aforesaid. Thereupon, said circuit court dismissed said



case out of said court, and taxed said plaintiff with the costs.

To all these rulings of said court said plaintiff excepted, and has brought the said case to this court, by appeal, and assigns the same for errors. A motion is here made by said defendant to dismiss said appeal, on the ground that said judgment is not a final judgment, &c.

The case, on said motion to dismiss, &c., and on the errors assigned, in the event said motion should be overruled, was submitted at the last term of this court, and has been held under advisement until this time.

The judgment dismissing said cause out of said circuit court, and taxing the plaintiff with the costs, is undoubtedly a final judgment, upon which an appeal may be taken to this court. The case is finally ended and determined in that court, and the plaintiff taxed with the costs, and there is an end of it. We, therefore, overrule the motion of defendant to dismiss this appeal.

On the errors assigned, we have no hesitation in reversing the judgment of the circuit court, dismissing said cause out of said court, and taxing the plaintiff with the costs. The court below fell into a very grave error, in granting said motion for a new trial, in a case which had been affirmed in this court; and in refusing to set aside the same on motion of the plaintiff, and in requiring him to go to trial in said cause, notwithstanding his said objections, and in dismissing said cause out of said court because he declined to do so, and taxing him with the costs.

The course pursued by said circuit court has strongly the appearance of setting this court at defiance, and treating its judgments with contempt; but, as the judge of said court before whom said proceedings were had, has departed this life, we forbear to say more than to pronounce them erroneous, and to reverse the final judgment by him rendered in the premises.

Let the judgment of the court below, dismissing said cause and taxing said plaintiff with the costs, be reversed, and remanded to said court below, with directions to said court to set aside and vacate the said order, granting a new trial, and to strike the said cause from the docket of said

court; and further, that said court order the clerk thereof to issue an execution on the said judgment of said court, as affirmed by this court, &c., as aforesaid, at the June term thereof, in the year 1868, and that the appellee pay the costs of this court and of the said circuit court.

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HALE *vs.* HUSTON, SIMS & CO.

[ACTION ON PROMISSORY NOTE GIVEN FOR A LOAN OF CONFEDERATE TREASURY-NOTES.]

1. *Confederate treasury-notes, promissory note for loan of; without consideration and void.*—A promissory note given in consideration of Confederate treasury-notes loaned, is without proper consideration and void, notwithstanding the contract was made between citizens of the State, and without any illegal intent. (PECK, C. J., *dissenting*.)
2. *Same; bills of credit within the meaning of constitution of the United States.*—Confederate treasury-notes are not recognized by any law of the State or of the United States as property. Their circulation was adverse to public policy. They were bills of credit emitted by an illegal combination of States in violation of the Federal constitution.
3. *Ordinance No. 38 of convention of 1867, second section of; constitutionality of.*—The second section of ordinance 38 of the State convention of 1867, which ordains “that all bills, bonds, notes or evidences of debt, outstanding and unpaid, given for or in consideration of bonds or treasury-notes of the Confederate States, or notes or bonds of this State, paid and redeemable in the bonds or notes of the Confederate States, are hereby declared null and void, and no action shall be maintained thereon in the courts of this State,” is not unconstitutional.

APPEAL from the Circuit Court of Sumter.

Tried before Hon. L. R. SMITH.

The appellees were sued on a promissory note, for the sum of six thousand dollars, made by them on the 18th of June, 1863, and payable to plaintiff or order one day after date.

The defense set up was, that the consideration of the note was Confederate treasury-notes, commonly called Con-

federate money, loaned by the plaintiff to them on the day the note bears date. On the trial, this plea was established by the proof, and also that the Confederate money, when lent, was of some value, and was used by defendants as valuable for their business purposes. This being all the evidence, the court charged the jury, that if they believed the evidence they must find for the defendants, to which plaintiff excepted, and now assigns the charge of the court for error.

TURNER REAVIS, for appellant.—The only question presented is, whether a promissory note given for a loan of Confederate money, at a time when the Confederate money was valuable to both parties, is void.

1. Such a note is *not* void, either for the want of a legal consideration, or for any other reason. It is supported by a valuable, legal, and moral consideration; and is not void on the ground of its being founded on a consideration against public policy. Public policy, morality, and justice, require that it should be recognized as valid. It is so recognized by the convention of 1865, and ought to be so recognized by all honest men.—See ordinance 26 of the convention of 1865, § 3, Revised Code, p. 59.

Chief-Justice Chase has recognized Confederate money as valuable, in several cases, and required parties who had received it in a fiduciary capacity, to account for its good money value. In *Keppell v. The Petersburg & Weldon R. R. Company*, he says, “the necessity for this currency was almost the same as the necessity to live. It had a sort of value, and a greater or less degree of purchasing power.”

In the language of Chief-Justice Handy, in *Green v. Sizer*, “to hold that all such contracts are void, and that the parties acquired no legal rights under them, would be alike contrary to well settled rules of law, and to sound public policy.”

And in the language of Judge Williams, in *Martin v. Horton*, to permit the maker of such a note, to receive such money from a party to whom it was valuable, and to use it for purposes valuable to himself, and then to escape his obligation to pay its value, would be to recognize a system of *legalized robbery*.



And in the language of Chief-Justice Pearson, in *Phillips v. Hooker*, "thus encouragement is to be given to dishonesty, justice is not to be administered, and the people of the country are to be involved in utter perplexity and confusion, in order to make a useless show of zeal on the part of the courts, to punish rebels."

The question is fully, and so ably argued and considered in the following cases, and so clearly and justly settled, that it would seem impossible to add to, or resist their force.—*Scheible v. Bacho*, 41 Ala. Rep.; *Green v. Sizer*, 40 Miss. Rep. 530; *McMath v. Johnson*, 41 Miss. Rep. 439; *Martin v. Hortin*, Bush's Ky. Rep. 629; *Phillips v. Hooker*, Phillips' (N. C.) Eq. Rep. 193; *Emerson v. Mallett*, *ib.* 234; *Turley v. Nowell*, *ib.* 301; *Cummings v. Mebane*, 2 Phillips' (N. C.) Rep. 315, January term, 1869; *Keppell v. Petersburg & Weldon Railroad Company*, decided at Richmond, by Chief-Justice Chase; *Harris v. Bank of Cape Fear*, decided at Raleigh, by Chief-Justice Chase, June 19, 1869; *Dearing v. Rucker*, 18 Gratt. Va. Rep. 426; *Boulware v. Newton*, *ib.* 708.

2. The 2d section of ordinance No. 38 of the convention of 1867, declaring such contracts void, is plainly unconstitutional, because it impairs the obligation of contracts. See the ordinance on page 185 of the acts of 1868; *Roach v. Gunter*, at the present term; *Weaver v. Lapsley*, at the January term, 1869; Opinion of Walker, C. J., in *Ex parte Pollard*, 40 Ala. Rep. 77, and cases therein cited.

WATTS & TROY, *contra*.

B. F. SAFFOLD, -J.—The question is directly presented whether a loan of Confederate States treasury-notes is such a consideration as will support, in whole or in part, a promise to pay a like sum in lawful money of the United States. We know judicially that the Confederate States was an organization hostile to the United States, and seeking to overthrow its supremacy over the territory and the people of the States comprising the Confederation; that its treasury-notes were issued and used in pursuance, and in aid of, that unlawful and revolutionary purpose. No

one will deny that contracts made for the use of this currency in aid of the rebellion would be contrary to public policy, and consequently illegal and void. Whether the use of it by the citizens of the States in rebellion, in the transaction of their ordinary business, and without any illegal or criminal intent, was legitimate and such as ought to sustain a promissory note or other obligation given in consideration of a loan of it, we will further inquire.

In the first place, the time when the note sued on was made, and the consideration given for it, preclude the supposition that the defendants promised to pay the amount expressed on its face in lawful money. To do justice between the parties, we must at once depart from the terms of the written contract. By what principle of law or equity shall we test their respective right and obligation? A promise to pay a stipulated sum of money in some specified commodity, is discharged by a payment of the value of the property at the maturity of the obligation.—*Jolly v. Walker's Adm'rs*, 26 Ala. 690; *Williams v. Sims*, 22 Ala. 512; *Young v. Scott*, 5 Ala. 475. But the article which is to be valued must be something either established or recognized by law as property, before a court can inquire of its value.

If it be said, that the plaintiff ought to recover the value of the Confederate money at the date of the contract, what authority have we for this? The same objection meets us as in the other case. A *quantum valebat* count can not be sustained, because the thing loaned is without the protection and recognition of law. Besides, it was not the agreement of the parties, nor is it the rule where payment is to be made in specific property.

The second section of ordinance 38 of the State convention of 1867, "concerning the value of contracts where the consideration was Confederate bonds or currency, and for the purchase of slaves," ordains "that all bills, bonds, notes, or evidences of debt, outstanding and unpaid, given for or in consideration of bonds or treasury-notes of the so-called Confederate States, or notes or bonds of this State paid and redeemable in the bonds or notes of the Confederate States, are hereby declared null and void, and no ac-

tion shall be maintained thereon in the courts of this State."

If it be said that this law is void, because it would impair the obligation of contracts, how can it be shown that Confederate money, the creation of an insurrection, is recognized, as the valid basis of a contract, by the constitution of the United States, which the purpose of its use was to destroy. Could a person be indicted and convicted for stealing Confederate money now? Could he be so dealt with for having stolen it during the war? Why is it now valueless?—the resources of the States which put it in circulation are not exhausted. It has been decided by this court and the supreme court of the United States that the Confederate government was not a *de-facto* government.—*Chisholm v. Coleman*, January term, 1869; *Texas v. White*, S. C. R. 1869. We, therefore, can obtain no aid from the principle of *lex loci*. The contract was not one of another State which we might enforce on the basis of comity, or refuse to execute because opposed to national policy.—Story on Conflict of Laws, § 244. It is one entered into under the domination of the laws of our own country, to which our courts must see that it conforms.

This note was given for a consideration against public policy. The circulation of these notes, in the ordinary business transactions of the citizens residing in the States in rebellion, was necessary to their use by the Confederate government in aid of the war. Without this circulation, the attempt to use them would have been a failure, and with the failure would have come the end of the rebellion. I do not mean to say that their circulation by the citizens was a crime to be punished, but it was efficient and indispensable aid to the rebellion, though involuntary. To hold that such a currency is a consideration for a contract, the obligation of which the Federal constitution may be invoked to sustain, is to invite and encourage insurrection, to which the people are always averse, and into which they are almost invariably forced by a comparatively few revolutionists.

It was given for bills of credit which no State, nor collection of States, can legally issue. To constitute a bill of



credit, within the constitution, it must be issued by a State, on the faith of a State, and designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life. The individual or committee who issue it must have the power to bind the State. They must act as agents, and of course not incur any personal responsibility, nor impart, as individuals, any credit to the paper.—*Briscoe v. The Bank of Kentucky*, 11 Peters, 257. Every ingredient of this too liberal definition, in favor of the rights of the States, entered into the composition of the Confederate States treasury-notes. That they were emitted by a combination or confederation of States, can not alter their character. Indeed, the combination itself was a violation of the constitution.—Const. art. 1, § 10, ¶ 3.

Assuming that they were bills of credit, is the contract between these parties on that account void? It is a sufficient answer to the question, to say that the supreme court of the United States has so decided.—*Craig v. Missouri*, 4 Peters, 443; see, also, *Linn v. State Bk. of Illinois*, 1 Scam. (Ill.) R. 87. A simple consideration will convince us that it must be so. The evil intended to be suppressed was extensively practiced by the colonies before and during the revolution of 1776. The effects were ruinous to society. Property was in confusion, business was prostrated, or carried on with distrust and suspicion, and every incentive to energy and enterprise was destroyed. Results so disastrous must be prevented. How can the prohibition be made effectual, if the circulation of such bills by the citizens of a State be lawful, or, being illegal, they are nevertheless the valid consideration of a binding obligation? What more effective agent for their entire suppression can be employed, than to declare that the contracts of which they are the consideration are absolutely void?

The consideration of this note was something not recognized by any law of the Union or of this State as property. It was adverse to public policy, having been created for purposes hostile to the Union. It was bills of credit emitted by an illegal combination of States, in violation of the Federal constitution. A law of the State forbids the

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Ex parte Bibb.

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courts to enforce such contracts. The note is, therefore, void.

The judgment is affirmed.

PETERS, J., *concur.*

PECK, C. J., *dissents*, on the ground that the supreme court of the United States, in the case of *Thorington v. Smith*, (8 Wallace, p. 1,) had decided this question adversely to the views of the majority of this court, and that its decision upon the matter was binding.

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### EX PARTE BIBB.

[APPLICATION FOR MANDAMUS TO COMPEL CIRCUIT COURT TO GRANT A NEW TRIAL, AND FOR SUPERSEDEAS TO STAY SALE OF PROPERTY ON JUDGMENT SOUGHT TO BE SET ASIDE, UNTIL DECISION BY SUPREME COURT.]

1. *New trials, grant of ; when may be authorized.*—The loyal, rightful, legislative power of the State, may by law authorize the grant of new trials in its own courts, where there was a good and meritorious defense in the first instance.
2. *Same ; what sufficient ground to support.*—It is sufficient grounds to open a judgment of a court of the insurgent government, erected in the State of Alabama, after the suspension of the rightful government which existed prior to the 11th day of January, 1861, and to grant a new trial therein, that such judgment was for a larger sum than might probably be due, and that one of the defendants therein was a Union man before the passage of the ordinance of secession, by the insurgent authorities. Very slight grounds in such case should be sufficient to justify the grant of a new trial.
3. *Original jurisdiction of supreme court ; powers conferred by constitution, how used.*—This is an application for *mandamus*, and it invokes an exercise of the original and separate powers of this court for the control of inferior jurisdictions. In such a case, the court acts under its own discretion, guided by the purposes of law and justice, and it will control by its process all the officers of the inferior courts, with the judgments of which it is asked to interfere. This process the court will construct as it may think wisest, under the purposes of the high powers with which it is clothed by the people by a constitutional grant.

This was a motion for a rule *nisi* to issue to the circuit court of Montgomery, to show cause why a *mandamus* should not be issued to compel said court to declare void, vacate and set aside, a certain judgment (more fully set out in the opinion), and to grant a new trial, &c., and for such other remedial writ or process, as might be necessary, the court below having refused to set aside said judgment, &c.

The facts upon which the application was based, as well as those in relation to the order of the court suspending a sale of the property, upon executions issued on the judgment sought to be set aside, until the decision of the court upon said application, will be found in the opinion.

The case was elaborately argued at the bar, but the briefs which came into the hands of the reporter, which are here inserted, do not give the full scope of the argument on either side.

STONE, CLOPTON & CLANTON made the following argument in support of the motion :

The decision in the case of *Weaver v. Lapsley*, at the present term, declaring unconstitutional the act of December 17th, 1868, and, separately, the second section of said act, makes it necessary to inquire, whether the principles of that decision affect the constitutionality of ordinance No. 39, or, can the constitutionality of that ordinance be sustained upon other grounds?

The act of December 17th, 1868, was an act of the legislature—the ordinance was an act of a convention ; and, whilst a convention can not violate the constitution of the United States any more than a legislature, yet, at the time the convention of 1867 assembled, the constitution of the United States had not extended its protection over the judgments and decrees of the courts in the southern States rendered during the war.

That convention derived its authority from the reconstruction acts, by virtue of which it was convened. The theory of these acts is, that the governments, existing in the southern States prior to 1861, had been overthrown and destroyed ; that no legal governments existed in those States ; and that reconstruction was necessary by the or-



ganization of a new government ; and that the conquering power, the United States, had the right to dictate the terms of reconstruction. Hence, for this purpose, the convention was authorized. That convention, so far as related to Alabama, represented the conquering power, and had the power to say upon what terms the State should be reconstructed in reference to its domestic internal affairs, provided that there was no violation of the reconstruction acts ; and hence, to say what force and effect should be given to the judgments of the courts rendered during the war—more especially, as, after Alabama should be reconstructed and readmitted into the Union, its officers would be called to execute these judgments.

What, then, did the convention do ? Without declaring the validity of these judgments, and leaving to be determined by the courts whether they were *void* or not, the convention did ordain that they were, at least, *voidable*, and to be avoided upon a meritorious defense being shown ; that is, those judgments rendered when there was neither a *de jure* or a *de facto* government, should not have the conclusiveness of judgments by competent courts, but that the courts of the reconstructed State of Alabama should avoid them, or set them aside, whenever a meritorious defense existed. This is the legal effect of ordinance No. 39. It is the same in principle, as if congress, in the reconstruction acts, or in the act admitting Alabama under the present constitution, had enacted that the courts of the State should open these judgments upon certain conditions ; or, perhaps, more analogous, congress had enacted that the courts of the United States should set aside the judgments of the courts of the Confederate States upon a meritorious defense.

The constitution of the United States having no vitality, or operative force in the State during the war, and these judgments, being rendered at such a time, can not be said to be *contracts protected* by the constitution.

The constitution framed by that convention had no force until approved by congress ; and the three departments of the government, as they now are, did not until that time exist. The convention which framed that constitution

adopted this ordinance—they were cotemporaneous. Hence, there can be no pretense that a legislative department is infringing the prerogatives and powers of the judiciary department. At the time the act of December 17th, 1868, was passed, there was a legislative and a judiciary department.

If these principles be correct, it necessarily follows that ordinance No. 39 is constitutional and valid.

The constitutionality of the ordinance being established, it follows, that if a meritorious defense exists, the applicants have a *clear legal* right to have said judgment opened, in order that they may have an opportunity to establish that defense. The object of the ordinance was to prevent injustice by the enforcement of a judgment rendered by a court not legal and competent, and upon a cause of action to which the defendant had, in whole or in part, a valid defense, which defense he was prevented from making, by any cause whatever, before such judgment was rendered. The only condition upon which his *right* to have the judgment opened depended, is the existence of a meritorious defense. The language of the ordinance is, "*shall be entitled to a new trial.*" These words are mandatory. The words "may," or "it shall be," when used in a statute, are peremptory, where the public or an individual has a right *de jure* that the powers conferred by the act should be exercised.—*Tarver v. Comm'rs Court of Tallapoosa*, 17 Ala. 527; *Ex parte Banks*, 28 Ala. 28.

Neither the ordinance, nor any subsequent statute, provides for an *appeal* from the decision of the circuit court, either refusing or granting such applications; and no other special way has been provided by which to bring such a decision before the supreme court. *Mandamus*, then, is the remedy; for where there is a clear legal right, and no other remedy, *mandamus* is the proper remedy.—*Stevenson v. Mansoney*, 4 Ala. 311; *Tarver v. Comm'rs Court of Tallapoosa*, *supra*; *Ex parte Garlington*, 26 Ala. 170.

It may be said, that a *mandamus* is to compel the court to act; but not to direct how to act. This is correct as a general rule; but it has its limitations, as follows: 1st. The *way to act* must be left in the discretion of the judicial offi-

cer. In this ordinance, *the way to act* is mandatory; he shall grant a new trial, upon satisfactory showing of a meritorious defense. He must, necessarily, judge of the sufficiency of the showing as he determines the rights of litigants in other controversies—a judicial judgment—but if he errs, this error does not deprive the applicant of his right to have a new trial. 2d. If a party has a clear legal right to have a *certain, specific act* done by a court, a *mandamus* will issue to compel the court to do *that certain, specific act*. For instance, a *mandamus* will issue to compel the circuit court to strike a cause from the docket, or to reinstate.—*Ex parte Robbins*, 29 Ala. 71; *Ex parte Lowe*, 20 Ala. 330; to enforce an agreement made in reference to a pending suit—*Ex parte Lawrence*, 34 Ala. 446; and, whilst it will not issue to compel the court to quash an original attachment, because it is the leading process, yet it is intimated, that it will issue to compel the quashing of ancillary attachments.—*Ex parte Putnam*, 20 Ala. 592.

But if a *mandamus* is not the appropriate remedy, then we insist that, by the constitution, the supreme court has a general superintendence and control over the inferior courts of the State, under such regulations as may be adopted by the legislature; and by section 660 of the Revised Code, the supreme court has power to grant injunctions, *habeas corpus*, and such other *original* and *remedial* writs, which may be necessary to give a superintendence and control over the other courts. The purpose is to give the supreme court a general superintendence and control; and if the writ of *mandamus*, injunction, &c., (power to issue which is specifically given,) is not appropriate, then the court can issue such other original and remedial writs as will accomplish this purpose; and, if there is no appropriate writ known in practice, then the court can make one, if it be necessary to enforce this superintendence and control.

*Certiorari* is the proper remedy to *revise* the action of an inferior court, when no other way has been provided.

If, then, the court should be of opinion that a *mandamus* is not proper, because the ordinance submits the question of a meritorious defense to the decision of the circuit court,



then we insist that a *certiorari* should issue to enable this court to revise that decision, and correct the action of the circuit court, if erroneous, thus exercising its general superintendence and control ; or, if necessary, a writ for this purpose should be adopted. The jurisdiction of the court will not be suffered to fail for want of a proper writ or process.

Now arises the question, is there a meritorious defense ? The defense is usury ; which, in itself, is meritorious, favored by the law, because a usurious contract is illegal, and opposed to public policy. Is there, then, usury in the contract, or bill of exchange, upon which the judgment was rendered ?

[Here follows an argument to show that the contract on which the judgment was based was usurious.]

Admitting, however, that there was no usury in the bill of exchange, and that the ordinance is unconstitutional, still this court ought to issue a *mandamus* to compel the circuit court to vacate or open said judgment, for the reason that it is void, and whilst it stands is a cloud upon the title to the property of the applicants and an apparent incumbrance.

The judgment was rendered in November, 1861. The then controlling authorities in Alabama were not a government *de facto*, as decided in *Chisholm v. Coleman*, at present term. If the whole was not a government *de facto*, its component departments separately, could not be. Here the court were not *de facto* courts, and every judgment rendered by them is void. The government in Alabama, at that time, as decided in the case above cited, was a rebel government, in hostility to, and not a part of the government of the United States. Equally, each constituent department thereof was in hostility to the government of the United States, necessarily, as officers, and in their official capacity and relations, those who held office under that government. The old government, says the court, had been destroyed, and these officers, judges or others, could not hold office as part and parcel of a rebel government, and ask recognition *now*, by virtue of their commissions from a destroyed government, or that their acts as such officers are,

therefore, valid. Courts can, at any time, declare a void judgment void, and open it, and it is their duty to do so. *Johnson v. Johnson's Adm'r*, 40 Ala. 246, and cases cited.

It will be contended, however, that this point was not made in the circuit court, and ought not to be considered by the supreme court. It is not necessary that the record should show that it was. The bill of exceptions was necessary to bring before this court the facts as to the meritorious defense, and so far as the application depended upon the evidence; otherwise, these facts would not appear. The motion entered on motion docket at January term, 1869, of the circuit court, is broad enough to cover and embrace both grounds for opening the judgment, upon a meritorious defense under the ordinance, or because it is void. The latter—that it is void—appears from the record itself, and no bill of exceptions is necessary to prevent it. No specific grounds are stated in the *motion*. When an error is apparent from the record, the supreme court will consider it, although the objection was not made in the other court.—*Crothers v. Heirs of Ross*, 17 Ala. 816—or, when it appears that the court had no jurisdiction.—*Wyatt v. Judge*, 7 Porter, 31. In this case, the court says, “it may, perhaps, be thought, that inasmuch as this objection was not made in the circuit court, it should not be regarded here. We understand the law to be otherwise. It was the duty of the circuit court, *mero motu*, to have repudiated the appeal, and it is certainly our duty to do what that court should have done. So, in this case, when it became apparent to the circuit court that this judgment was void, it was the duty of that court to have so declared on the motion then before the court; and it is the duty of this court to do what that court should have done.

This duty becomes the more imperative, if we consider the public interest. If these judgments are void, the good of the public requires that it should be known as early as possible. Soon, property will be sold under these judgments. If void, no title passes, and purchasers lose their money; if valid, in the uncertainty, property will be sacrificed.

ELMORE & GUNTER, and E. J. FITZPATRICK, against the motion.

It is well settled that, in case of a change of rulers, either by treaty or conquest, the relations of citizens to each other and their rights vested under the government displaced, are not altered or affected.—*Leitensdorfer v. Webb*, 20 How. 176, and authorities there cited.

The principle on which this rule is established is, that it is the interest of civilization that all communities shall, at all times, obey some law and some ruler, and it is better for humanity there should be bad laws and bad rulers than that social chaos should exist. The good order and stability of society demand this rule shall be observed, and that individual rights shall not be left to the chance of loss by changes of government so liable to occur from the many causes of popular commotion. The rule applies equally, whether the displaced government is *de facto* or *de jure*—a lawful government, or one which only exists by reason of its power to maintain itself for the time being.

The supreme court of the United States, in the case of *Texas v. White, et al.*, have settled that the State of Texas had, during the rebellion, a government *de facto* for domestic and municipal purposes, though that government was not such so far as its acts in aid of the rebellion were concerned. This court has accepted (in *Reynolds v. Taylor*,) that portion of the opinion of the court as correct. The status of Alabama was precisely the same, and its laws and organization “for remedies for injuries to person and estate” were valid.—*Texas v. White*.

The court rendering the judgment, here sought to be annulled, was part of the State organization, and rendered the judgment in administering the law “providing remedies for injuries to person and estate.” If the law was valid the court was valid, and the judgment good then and now.

If it be said that the ordinance of secession was a nullity, and the State still in the Union, then its laws in force on 11th January, 1861, remained in full force. These laws provided for courts and furnished “remedies for injuries to person and estate.” If no person could administer them, they were useless, and the protection they offered was lost



to all persons, even the most faithful to their allegiance. The organization of the courts remained after secession as it was before. The same individual who was judge of the second circuit *before*, continued to be judge of that circuit *after* secession. If the ordinance could not take the State out from the Union, how could his opinions and sentiments, and the expression of them, either in the caption to the minutes of the court or in the speech proven in the evidence, take out of him the judicial power and jurisdiction reposed in him? The relation of the court to the State as it was before secession, and as it is now, was unaffected by the ordinance or his sentiments either.—*White v. Cannon*, 6 Wallace, 443.

Judgments rendered after 11th January, 1861, in courts of record, are recognized as valid by ordinance No. 39 of the convention of 1867. New trials in certain classes of such judgments are granted by that ordinance; if such judgments are void, what necessity for new trials?

The legislature of 1868 adopted the Revised Code of Alabama.—Acts of 1868, p. 7.

That Code contains ordinance 26 of convention of 1863. Besides, the convention of 1865 has been determined by this court to have been part of a valid provisional government. In *Herbert & Gessler v. Easton*, at this term, this court treats ordinance No. 26 as a valid law. That ordinance, in its first section, ratifies and confirms "all judgments, orders or decrees of the several courts of this State rendered after 11th January, 1861."

Sections 2825 and 2827 of that Code provide new trials in judgments rendered between 11th January, 1861, and 1st May, 1865, and 1st January, 1867.

Section 2832 provides that executions may issue on judgments rendered "since 11th January 1861, and prior to 15th December, 1865."

The legislature of 1868 provided for appeals to the supreme court from probate courts on all final decrees "since January 11, 1861."—Acts of 1868, p. 39.

And for new trials on judgments rendered prior to 25th May, 1865.—Acts of 1863, p. 415.

And in the act known as the *bona fide* purchaser's bill,

they amended the several laws pertaining to liens of judgments, and treat such laws and judgments rendered during the war as valid.—Acts of 1868, p. 266.

Besides these, the legislative and official acts of the State government and officers, during the rebellion, are recognized in a degree more or less direct in the acts of 1868, on pages 12, 13, 23, 25, 88, 392 and 502, and by ordinances No. 16, 37, 38 and 40 of the convention of 1867.

After examining the above citations, no one can entertain a doubt that the convention of 1867 and the legislature of 1868, as well as the convention of 1865 and the legislatures of 1865-66, and 1866-67, fully recognized as valid the action of the courts during the rebellion in so far as it was not in aid of the war, or in conflict with the constitution of the United States.

This recognition is by the *political department* of the State. It does not restore vitality to a dead thing, nor make that of force which was void, but it recognizes that such action of the courts was valid then and valid now, for all purely domestic and municipal purposes between individuals.

Recognition of the validity of judgment is not passing upon the rights involved in the matter tried before the court, and can not be said to infringe the constitutional provision forbidding a citizen to be deprived of property without due process of law.

But if the validity of this judgment were doubtful even, it should be sustained rather than bring upon a people the unnumbered woes and wide-spread ruin that a contrary decision would produce. It is a settled rule of courts in doubtful cases, to adopt that view and rule which is the most likely to give general peace and repose. The whole country has acted upon the idea of the validity of courts during the war; to destroy that idea would be to open a flood of litigation and controversy which would be disastrous in the extreme.

Since preparing the above, we have seen what Judge Chase decided in the united States circuit court of Virginia, in the case of *Evans & Evans v. the City of Richmond*, viz: "That the governor, legislature, and judges of Vir-

ginia, during the war, constituted a *de facto* government. They exercised complete control over the greater part of the State, proceeding in all the forms of organized government and occupying the capitol of the State."

PETERS, J.—The facts upon which the determination of this case depends, are these :

On the 3d day of May, 1861, Howell Rose brought suit against J. F. Jackson, Thomas J. Judge, William C. Bibb, and Benajah S. Bibb, in a court styled in the record, the circuit court, in the county of Montgomery, in the State of Alabama. This suit purports to have been instituted for the recovery of twenty-five thousand dollars, due and owing on a bill of exchange, drawn by the above defendants and accepted by Thomas H. Watts and William H. Rives, and dated March 27th, 1860, and payable twenty months after date thereof to Howell Rose, the plaintiff. Protest and notice are waived on the face of the bill, and it was payable at the office of Benjamin Trimble, in Wetumpka, Alabama. Interest and damages are claimed in the complaint, and it is alleged that "the same not being paid at maturity, was duly protested, of which said defendants had due notice." This cause was tried before the Hon. Nat. Cook, judge presiding, on the 19th day of November, 1861, and "of the independence of the Confederate States the first year," when the suit was discontinued as to Judge, who had not been served with process, and judgment was taken against the other defendants for the sum of \$27,609:65, the demand in the complaint mentioned, together with costs of suit.

Afterwards, on October 29th, 1868, the said Benajah S. Bibb and William C. Bibb moved in the circuit court of the county of Montgomery, in this State, in the office of which court the record of said judgment is found, for a new trial in said cause; the said Jackson having died after the rendition of said judgment, and before the making of said motion. This motion was regularly continued in said court in which it was made until December 2d, 1868, when it was heard and refused. On the trial of this motion, a bill of exceptions was signed by the presiding judge, from which



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it appears that the applicants for new trial offered evidence tending to show that the bill of exchange, on which the original judgment was founded, was a transaction for the borrowing of money; that only the sum of \$23,000 was paid for said bill of exchange; that said Benajah S. Bibb and William C. Bibb were only accommodation drawers of the same. It also appeared that the judgment sought to be opened for new trial was one rendered in a court of the rebel government, set up in the State of Alabama after the 11th day of January, 1861; and that Benajah S. Bibb was a Union man, and resisted the insurrectionary movement for a separation of this State from the Union up to the passage of the ordinance of secession, but after that he acquiesced in the action of the convention of the 7th of January, 1861, by which that ordinance was passed, and submitted to the rule of the insurrectionary government which that convention erected in this State, and aided in its support.

Upon this showing application is now made to this court for a rule *nisi* for *mandamus* to the circuit court, to compel that court to grant a new trial in said cause.

This application here renders it necessary to consider the effect of the ordinance No. 36 of the convention of the 5th of November, 1867, entitled "An ordinance to declare void certain judgments, and to grant new trials in certain cases therein mentioned," passed December 6th, 1867; and the act of the general assembly, entitled "An act to extend the time in which to open judgments and grant new trials in certain cases," approved October 10th, 1868.—Pamphlet Acts 1868, pp. 186, 259.

There can not, now, certainly be any doubts as to the power of the legislative department of the government to pass a law authorizing the opening of judgments and the grant of new trials. This has been an authority uniformly exercised by the government of the State from its commencement, and has never, so far as I know, been seriously questioned.—Akin's Dig. p. 283, § 135; Clay's Dig. 340, § 150; Code, § 2407, 2408; Pamphlet Acts, 1857–1858, p. 39, No. 39; Revised Code, §§ 2813, 2814, 2845, 2827; *Ex parte Norton & Shields*, January term, 1870.

The convention of the 12th of September, 1865, seem to have entertained no scruples nor doubt on this right of the legislative branch of the government. This ordinance is almost in the very words of the ordinance No. 36 above referred to.—Revised Code, pp. 58, 59, No. 26, § 1. This power is one without any constitutional restriction.—*Calder v. Bull*, 3 Dall. 386; *Crawford v. Br. Bank Ala.*, 7 How. 279.

A new trial is a part of the remedy, and it has existed from the earliest times, and over this branch of practice the legislature of the State, unless the State constitution limits its authority, has the amplest power.—2 Bouvr. L. D., *new trial*, p. 210; 1 Sellar's Pr. (1813) p. 463; *Sturges v. Crowningshield*, 4 Whea. 122, 200. The granting of a new trial does not impair the obligation of a contract on which the judgment may be founded; if it did, no new trial could ever be granted. But this is contradicted by the practice of the States, and sanctioned by the highest judicial tribunal of the nation.—*Balt. & Susq. R. R. Co. v. Nesbit*, 10 Howard, 395. The ordinance No. 30, above cited, which is affirmed and adopted by the act of the general assembly, also above cited, does not grant the new trial as was done in *Calder v. Bull*, *supra*; but it commands that it shall be done, if the application is made to the proper court in the manner and time directed in the act and ordinance. In the case at bar this has been done.

Controlled by the authority above referred to, I have no doubt of the constitutionality of the ordinance No. 36, and the act of the legislature confirming and adopting it. Both are wholly free from all constitutional objections, so far as the allowance of new trials is involved.

It remains, then, to inquire whether the facts submitted to the court below were sufficient to justify the opening of the judgment and the grant of a new trial.

In the first place, the judgment is that of an illegal court. The clerk who issued the writ, the sheriff who served it, and the judge who gave the judgment, so far as this court can know, were all mere usurpers, who did not hold their offices by color of any rightful authority. The court was not that of a State of the Union, and the government of

which it formed a part, was not that of a State of the Union. The judge who presided in it was not a judicial officer, recognized in this court, or by the rightful government.—*Chisholm v. Coleman*, January term, 1869. The government and the court in which this judgment is presumed to have been rendered was a foreign affair.—*Scott v. Jones*, 5 How. 343, 377. No such foreign court could be rightfully set up in this State. There was no law or treaty to authorize it. No citizen of this State was bound, in law, to answer to its summons or plead to its process. For the reasons above shown, it was wholly destitute of any authority as a legal court.—*Glass v. Schooner Betsey*, 3 Dall. 6; 10 Bac. Abr. p. 374, *verb void*; 3 Blackstone's Com. 24, 25. The whole proceeding was utterly void, as though it had never taken place, unless validity is given to it as a decree of a court of a government illegally and unconstitutionally erected in a State of the Union. To give legality without legislative assistance to such a tribunal, is to give legality to the insurrection itself—to give legality to treason against the government of the United States. *Shortridge & Co. v. Macon*, Pasch. Annotated Constitution, p. 212. To recognize the sentence of this court as legal is to recognize the court as legal, and the government of which the court formed a part as legal; for they all cling together as a whole. But this can not be. The entire current of decisions from *Scott v. Jones* to *Texas v. White*, denounce such a government as utterly void in all its departments, without legislative affirmance and ratification.—*Texas v. White*, 7 Wall, 700; *Luther v. Borden*, 7 How. 1; *Scott v. Jones*, 5 How. 343; *Glass v. The Betsey*, 3 Dall. 5; *Shortridge & Co. v. Macon*, Paschall's Ann. Const., p. 212.

And the congress of the United States, and the chief of the highest executive department of the nation, have done the same.—Acts of Congress, Stat. March 2, 1868, Pamph. Acts, pp. 90, 260; Stats. at Large, p. 14, ch. 30; President Johnson's proclamation, 1865. Those emphatic declarations of the illegality of the rebel government, erected in this State during the late insurrection against the government of the United States, have never been taken back or



modified, either by the Federal or the rightful State government; and this court, and all the courts of the nation, are bound to be governed by them. They are the only law upon the subject known to this court and must govern here, unless their validity is disputed. The attempt to incorporate and engraft into our law the European system of *de facto* governments, and the consequences which flow from them, has been wisely and emphatically repudiated, by the venerable head of this tribunal in his very learned and unanswerable opinion, delivered at the first session of this court, under its present organization, in the case of *Chisholm v. Coleman*, in which, as I think, that doctrine was properly denied acceptance here, and repelled as inapplicable to our system of governments, and to the peace of the country. It is the offspring of insurrection, and calculated to encourage them. There can be no doubt about the power of the legislative departments of the government of the Union, and the rightful and legal government of the States, to validify by law of their own enactment, whatever it may be wise and proper to make good after the suppression of a rebellion against the sovereignty in the States, or within the territories of the Union. The law-making power is wisely lodged with them alone. And it is by the laws of their enactment that the land must be governed. Laws can neither be enacted nor imported by the courts, however strong their suppositions of their necessity may proclaim their want. I therefore think that to enable any government, erected in a State of this Union, to enact valid laws, or its courts to render valid judgments, it must be a legal State government, and must be acknowledged by the congress of the United States as such; otherwise, all its acts, and the acts of all its courts are utterly void, and they can only become valid by the affirmation and ratification of the rightful legal government in its restoration to power, or by the rightful government of the nation, as the question may be one of domestic or national import. In this State necessity may be pleaded to excuse an individual act, otherwise unlawful, but it can not be pleaded to validify a law or a judgment of an incompetent authority.

That which is illegal remains illegal until the law removes its illegality, and laws can only be passed by the agency which is clothed by the fundamental law of the State, or of the Union, with that great right. This is a principle which forms the very basis of all our State governments. And as a great jurist and statesman has said, upon another occasion, "doubtless the continuance of regulated liberty depends on maintaining this principle."—(*Daniel Webster.*)

To depart from this is to turn over to the courts a portion of the legislative power of this State—the power to say what laws and what judicial acts of an illegal government shall have effect, and what shall not have effect. Such power the courts are expressly forbidden to exercise. Con. Ala. art. 3, §§ 1, 2; art. 6; art. 5.

This judgment, then, was *coram non judice*, and does not bind the defendants, even as the judgment of a foreign court, because it was not a court of a government acknowledged by the rightful political authority.

Another question occurs in connection with this case. It is this—has this judgment been made good, ratified or affirmed, in any manner by the rightful authority of the State, or of the general government? I think it has not. All the departments of the government are mere agencies. *Cooley*, 87, *et seq.*, and notes. They are depositories of special and separate powers of administration, and the one can not perform the agency entrusted to another.—*Waymay v. Southard*, 10 *Whea.* 46.

And as it is with other agencies, what one agency is forbidden to do in the first instance, it can not ratify, if done in the name of another, by an illegal authority, or rather, by another agency wholly void. The legislative agency can not make a judgment good which has been rendered by a void and illegal court, unless it could have conferred authority upon such void court to have given the judgment in the first instance. But this the legislative authority has no power to do. This was a judgment by a circuit court. The legislature has no power to make circuit courts, nor to give the judgment of a circuit court. Then such a ratification would be void for want of authority to make it. *Cooley on Const. Limit.* p. 108, and notes; *Denncy v. Mat-*

toon, 3 Allen, 361 ; Story's Agency, §§ 240, 241, and notes. Here the judge was an intruder. His right of jurisdiction was founded on no legal authority whatever, and the judgment falls for want of legal authority in the court. This the legislature can not supply. *Debile fundamentum fallit opus*.—Broom's Max., p. 80, marg. In this case the legislature has done all it can do. It accepts the proceedings in the rebel courts as a basis for an application for a new trial.

The ordinance No. 26, of the convention which assembled at the capitol in the city of Montgomery, in this State, on the 12th day of September, 1865, not being in conformity with the principles of this opinion, is, as a legislative act, illegal and void, so far as this case is concerned ; and the decision in *Randolph v. Baldwin*, which is founded upon it, is overruled.—Revised Code, p. 58 ; *Randolph v. Baldwin*, 41 Ala. 305.

It is contended that the judgment in this case is founded on a contract for the loan of money. If this be admitted, then that contract was usurious. The sum of \$23,000 was received in the bill of exchange, and \$2,000 were to be paid for the use of it for one year. This was above the rate fixed by law. Under such a state of facts, the judgment should have been only for the sum loaned, and without costs.—Revised Code, §§ 1831, 2781. Yet the recovery was for \$27,609.65 and all costs. This was \$4,609.65, and all the costs, too large. Under this hypothesis a new trial should have been granted.

Besides, the complaint alleges that the bill of exchange was "duly protested, of which the defendants had due notice." This is not surplusage and should have been proved, or the complaint amended to suit the true state of the facts. But at the date the bill matured it is more than probable that there were no legal officers of the rightful government of Alabama in power in this State, and it would not have been permitted to the defendant, Benajah S. Bibb, who was a Union man, to have alleged or contested this question in the so-called court in which this judgment purports to have been rendered, without peril to his life or liberty.—Hon. C. C. Sheats' case. It is, there-



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fore, almost certain that he could not have made the same defenses in that court that he could have made in the courts of the rightful government. This is an additional reason, not without much force, for the grant of a new trial in the court below.

I therefore think, for all the above reasons, and under the facts of this case, that a rule *nisi* in conformity with the prayers of the applicant's petition, ought to be granted.

The grounds relied upon in this suit should justify the allowance of an application for a new trial upon very slight showing.

This is an application for *mandamus*, and it invokes the exercise of the original and plenary powers of this court. They are derived from the second section of the 6th article of the constitution of the State, which is in these words :

"Sec. 2. Except in cases otherwise directed in the constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this constitution, as may from time to time be prescribed by law ; *Provided*, that said court shall have power to issue writs of injunction, *mandamus*, *habeas corpus*, *quo warranto*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."—Con., art. VI, § 2.

From this it will be seen that it is only the appellate jurisdiction of this court that is subject to legislative control ; but the power to grant the several writs above mentioned, and to superintend and control inferior jurisdictions, is inherent in the court by constitutional grant with which the legislative department has no authority to interfere. Then, in the exercise of these powers, the practice of the court becomes the law of the court. These powers rest upon the same basis that the separate and original powers of any other department do, upon a grant by the people—the sovereigns—to the court, by constitutional provision. Under these powers, in the performance of the duties arising out of them, the court proceeds according to its own discretion. But this discretion is not to be a reckless and unreasonable discretion, but such as shall lead most certainly

to the accomplishment of the highest justice, and the enforcement of the laws.

Under this construction of the powers of the court, thus derived, in the progress of this cause at the bar, an order has been granted in favor of the applicant, Benajah S. Bibb, to suspend the sale of his lands levied on under a writ issued on the judgment sought to be opened in this cause in the court below, in which the application was made. Under this order a writ was issued from this court, directed to the sheriff of the county who had possession of said writ of *feri facias* for execution, to suspend a sale under said writ upon the conditions and for the length of time directed in said order.

This proceeding was necessary in order to afford this court proper time to look into a case of so much novelty and difficulty as this, and to secure the rights of the parties interested from further complication in a matter of so much uncertainty; and to give to the action of this court its proper effect in this case.

In such a matter there can be no reasonable doubt of the power of the court to control the action of the circuit court and all its officers, as an inferior jurisdiction, according to its discretion, and to construct its writs to suit the exigencies of the case before it, under the authority of the section of the article of the constitution above quoted, without legislative aid or interference.

Let the rule *nisi* be granted.

PECK, C. J.—I hold that the circuit court should have granted a new trial on the application of said B. S. Bibb *et al.*, on the judgment of Howell Rose against them, revived in the name of his executors, Hatchett & Trimble, and that an alternative *mandamus* should issue to require said court to do so. But this decision does not require this court to consider or determine the character of the judgments of the courts of the rebel States during the rebellion; whether valid, voidable, or void. I, therefore, concur with Justice Peters in the decision of the court just announced by him; and as it is unnecessary to go further, and determine the character of those judgments at this

time, I do not wish it to be understood that I concur with him in the argument and reasoning used by him on that subject; as to that question, I hold myself wholly and altogether uncommitted.

B. F. SAFFOLD, J.—I concur in the order of the court, granting an alternative *mandamus* to the judge of the circuit court to give the applicant a new trial in a case where judgment was rendered against him during the war, on the ground of meritorious defense, as provided in the third section of ordinance No. 39 of the convention of 1867.

But I dissent from so much of the opinion of Justice Peters as tends to declare void all of the acts of the government existing in the State during the war, for reasons given in my dissenting opinion in the case of *Hoffman v. Boon & Booth*, at the June term, 1869.

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TURNLEY ET AL. vs. BLACK ET AL., EX'RS.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note, payee of; presumption prima facie of title in.*—In an action by executors on a promissory note, found by them among the papers of their testator, and not payable to him, but to a third person, in which the defendants filed a sworn plea that the said note was given and payable to said third person, and never endorsed or assigned to plaintiffs' testator, and that the plaintiffs had no interest or title in said note, and where the evidence is contradictory—that on the part of the plaintiffs tending to show that the said note had been transferred by the payee, and that on the part of the defendants, that there had been no such transfer, but that the note was still the property of the payee—it is an error, for which the judgment will be reversed and cause remanded, to refuse to give a charge, in writing, asked by the defendants, that the note being payable to a third person, the law presumes him to be the owner until the evidence shows that his title to the note has terminated.

APPEAL from the Circuit Court of Calhoun.

Tried before Hon. W. L. WHITLOCK.

The facts upon which the decision is based, are sufficiently set out in the opinion.



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Turnley et al. v. Black et al., Ex'rs.

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J. T. HEFLIN, and WALKER, MURPHEY & WINTER, for appellants.

ELLIS & CALDWELL, *contra*.

PECK, C. J.—This action was brought by the appellees, as the executors of the last will and testament of Peter Black, deceased, on a promissory note made by the appellants and payable to one J. G. J. Whiteside. The appellants filed a sworn plea, that the said note was given to said Whiteside, and that said note was never endorsed nor assigned to said appellees' testator, and that they had no interest in, or title to, the said note. A trial was had by a jury on this plea. The appellees read the said note to the jury, and then proved by S. R. Black, one of the executors, that as executor he found the said note among the papers of the deceased, and made a return of the same to the probate court, as a part of the assets of testator. There was much evidence on both sides; that on the part of appellants tended to show, that the note had never been transferred to the deceased, or otherwise parted with, by said Whiteside; and that on the part of the appellees tending to show, that he had transferred the said note to the deceased. When the case was submitted to the jury, the appellants asked the court, in writing, to give six several charges to the jury, all of which were given, except the second, which was refused. The second charge asked, is in the following words, to-wit, that "the note being payable to J. G. J. Whiteside, the law presumes he is the owner, until the evidence shows that his title to the note has terminated."

Under the said plea and the evidence in the case, this charge should have been given. It is certainly true, that the law presumes that the payee is the owner, until the contrary is shown.—*Grigsby, Ex'r, &c. v. Nance*, 3 Ala. 347; Greenl. on Evidence, § 41. But this presumption is overcome, when it is proved to be in the possession of another claiming it as his own, or if found among the papers of a deceased person.

The appellants, under the plea and the evidence, were entitled to have the question, whether this note belonged

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to the payee, or had been transferred to appellees' testator, fairly submitted to the jury. The charge asked and refused, if given, would have done this. As the evidence of the appellants tended to show that the note still belonged to the payee, whether strongly or slightly, was not a question for the court, but for the consideration of the jury, therefore, the charge asked and refused should have been given. The refusal to give this charge, with other matters stated in a bill of exceptions, relating principally to the admissibility of evidence, are assigned for errors. We think, however, there is nothing in the other assignments of error, but for the error in refusing to give the second charge, the judgment is reversed and the cause remanded, at the costs of the appellees.

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### GOREE vs. WALTHALL, ADM'R.

[TROVER BY ADMINISTRATOR AGAINST WIDOW FOR CONVERSION OF PERSONAL CHATTELS, CLAIMED BY HER UNDER PAROL GIFT FROM HUSBAND DURING COVERTURE.]

1. *Gift to wife during coverture; husband may make, of personal chattel, by parol.*—Under the statutes of this State, the husband may make a valid gift by parol, of personal chattels, to the wife during coverture, and the title vested in her thereby, is good at law, without a resort to equity.
2. *Same; what gift is subject to.*—The wife takes such a gift from her husband, subject to the just claims of his creditors existing before the gift, and to all the equities of good faith and fair dealing.
3. *Manual delivery; when not necessary.*—Where the gift consists of a ponderous article, or things not capable of handling, as, for instance, a carriage and horses, there need not be an actual manual delivery of the property to the wife; but any circumstances amounting to a clear demonstration of the intention of the donor to transfer, and the donee to accept, the property given; and which put it in the power of the donee, or give the donee authority to take possession of the thing given, are enough to complete the right. And these circumstances are to be left to the jury.

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APPEAL from the Circuit Court of Perry.

Tried before Hon. JOHN MOORE.

The opinion contains the facts of the case.

SAM'L F. RICE, and WM. M. BROOKS, for appellant.

BAILEY & BRAGG, and WATTS & TROY, *contra*.

PETERS, J.—This cause was submitted at last term, and held under advisement until the present term of this court. It was an action of trover commenced in the Perry circuit court, by Walthall, as the administrator of Robert T. Goree, deceased, against Mary F. Goree, the widow of said deceased, for a carriage and horses, and carriage gear, which was claimed by Mrs. Goree as a gift from her husband, made after marriage and before his death. The summons purports to have been executed on the 26th day of August, 1858, but the bill of exceptions is dated in November, 1857. This latter date was doubtless a clerical misprision. And as no objection was taken to it on the argument at the bar, it is an irregularity that will not be further noticed here.

The bill of exceptions contains all the evidence which was delivered to the jury. The testimony set out in the bill of exceptions is wholly uncontradicted. And in this evidence, thus set out, there is some proof tending to show a parol gift by the husband to the wife, during coverture, of the property sued for. The property came into the possession of the wife by what the husband declared to be a gift, just before his death, and the wife held it and claimed it as her own, under her possession thus derived, until after her husband departed this life. At the date of the commencement of the wife's possession, her husband and herself were domiciled in this State and inhabitants of the same. The wife's possession had its beginning in the State of Louisiana, but was continued in this State during the life of the husband up to his decease.

On the trial, "the court, at the instance of the plaintiff" below, "charged the jury, that the remedy of the defendant" below, "was not in this court, but in a court of equity,



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and that if they believed the evidence, they must find for the plaintiff." This charge was excepted to by the defendant, and the objection reserved; and, thereupon, a verdict was rendered in favor of the plaintiff for damages to the amount of the value of the property mentioned in the complaint. On this verdict judgment was accordingly entered, and from this judgment Mrs. Goree appeals to this court, and assigns the charge of the court and the judgment below against her for error.

If a husband who is domiciled in this State can make, during coverture, a valid parol gift to his wife of personal chattels, which vests in her such a legal title as to enable her to defend her possession of such chattels at law, without a resort to equity, then the charge of the court below was erroneous; because there was proof strongly tending to show a gift by parol, made by the husband to the wife, of the property, made after her marriage to him and whilst the coverture still lasted. The charge was calculated to take this proof from the jury, and it invaded their province to determine the fact of gift or no gift. This charge left the jury no choice. It was, in effect, a verdict by the court.

But if the husband could not give, by parol, the property in controversy to his wife during coverture, then the charge of the court was right, and it ought to be sustained; because the proof showed that, if it was a gift at all, it was made by the husband to the wife during coverture, by parol. If such a gift was void at law, it could not clothe the wife with any legal title to the property thus attempted to be bestowed upon her, and she could not defend her possession at law; however solemnly and formally the gift might have been made, against the husband it must fail, at law.

But is it true, as a legal proposition, that under the law of this State, a husband can not, during coverture, make a gift, by parol, of personal chattels to his wife, which would be good at law? We think not, but the reverse of this proposition is true.

So far as the acquisition and ownership of property is concerned, the former common law relation of husband and wife, if not wholly overturned, is so greatly modified

by the statute law of this State as to require a system of rules of its own, in conformity to the law governing this relation in reference to the acquisition and ownership of property.

Under our statutes, the wife is a property holder, separate and apart and independent of the husband, both in law and equity. Her identity in this respect is not merged in him. She has all the rights to acquire property, and to hold it and enjoy it, that the husband has himself, with one single exception, and under the restrictions of the statutes enacted for her protection. The exception is, that the "husband and wife can not contract with each other for the *sale* of any property."—Rev. Code, §§ 2371, 2374. She can not buy property from her husband, nor her husband from her. This is the only prohibition. This is most clearly so, upon the familiar rule of construction, that the mention of one prohibition excludes all other prohibitions not mentioned. This rule applies to the constructions of statutes as well as to contracts.—3 Story, 87.

Then the wife may acquire property just as the husband may acquire property, except in the single manner forbidden in the statute. In this she stands on an equal footing with him. She is his equal and his peer. The law so intends it. Then the wife, after marriage and during coverture, may become entitled to property in any manner that the husband may do, to the same, and she holds her property under limitations of the statute by like title that any other person may hold similar property, if it is not held by *sale* from the husband. The statute is made for her protection and assistance, and not to cumber her with disabilities, as at common law. The statutes of this State clothe the wife with the great, inalienable right to own and hold property, as any other reasonable human being may do, under the limitations imposed by law.—Const. Ala. 1867, art. I, § 1. And they do not forbid the husband to make her the recipient of his bounty, even if he choose to give her "all the substance of his house." But if the wife accepts a gift from the husband, she takes it subject to the just claims of the creditors of the husband existing before the gift, and to all the equities of good faith and fair dealing.

I feel strengthened in the correctness of this conclusion, by the action of our eminent predecessors in this high tribunal.

In *Saunders v. Garrett*, it appeared that Saunders was garnished in 1857, under a judgment in favor of Garrett against Stewart, to answer what he (Sanders) owed Stewart. The garnishee answered, "that he is indebted to said defendant (Stewart) or his wife, Sarah L. Stewart, by promissory note, in the sum of \$175 00, due January 1st, 1856, which note was given by him to Sarah L. Stewart, wife of said defendant; the trade for which it was given having been made and agreed upon by both defendant and his wife." Upon this answer at common law, before the passage of the statute protecting the wife's estate, it would have been the duty of the court to have rendered judgment against the garnishee, condemning the debt to the payment of the judgment against the husband, Stewart. But under our statute for the protection of the rights of married women, this court decided that Garrett took nothing by his garnishment.—33 Ala. 454; *Roland v. Logan*, 18 Ala. 310.

This case establishes the position, that under our statute a married woman has the capacity to become a property holder and a property owner, and that her capacity in this respect is limited by the statute only. And it does not appear from the words, or from the just construction of the law, that she is in any manner prohibited from holding property *given* to her by her husband, we feel bound to decide that she may hold property acquired in that way. The fact that this statute does contain a prohibition against the husband and wife contracting with each other for the *sale* of any property, coupled with the further fact that the same statute contains *no* prohibition against a *gift* by the husband to the wife, must operate to give strength to this conclusion. It follows from this, that the husband may make a valid gift, by parol, of personal chattels to the wife, during coverture; and that such gift is a sufficient title to justify and sustain a defense at law, without a resort to equity.

Besides the question above settled, it was insisted at the



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bar, in the argument of this case, that a gift by parol can not be completed without an actual and formal delivery. We do not deem such a delivery necessary in this case to constitute such a gift. All that should be required is, that the donor shall abandon his property in the thing given, and that the donee shall step into his shoes. Any thing that amounts to this is sufficient. In such a gift as that in controversy in this case, actual manucaption by the donee is not indispensable. It is not to be expected that a wife would accept the gift of a carriage and horses as she would a watch or a jewel, from her husband. If he brings such a gift to the house where she is tarrying, with the declared intention of bestowing it upon her, causes her name to be engraven on the carriage, calls her out to try it, tells her it has been bought for her, and that it is hers and not his, and leaves it in her possession and under her control, and she remains in possession of it, claiming it and controlling it as her own, as a gift from her husband, until his death,—this is a sufficient delivery to perfect the gift. In such cases, *by delivery*, is not meant an actual manual delivery, but any circumstances amounting to a clear demonstration of the intention of the donor to transfer, and the donee to accept the thing given, and which puts it into the power of the donee, or gives such donee authority to take possession of the thing given, is all that is necessary to perfect the gift. And these circumstances are facts to be left to the jury.—*Reid v. Colcock*, 1 Nott & McCord, 592, 603. The proofs in this case fully sustain such a delivery, and the gift was good at law.

The court below erred in the charge to the jury, as shown in the record. And for this error, the judgment of the circuit court is reversed, and the cause is remanded for a new trial in the court below, and the said appellee, Walthall, as administrator of the estate of Robert T. Goree, deceased, will pay the costs of this appeal in this court and in the circuit court.

## ARNOLD vs. FOWLER.

[BILL IN EQUITY TO ENJOIN JUDGMENT AT LAW ON WRITTEN CONTRACT,  
AND SUBSTITUTE PAROL, FOR WRITTEN, CONTRACT.]

1. *Written instruments ; when equity will grant relief in cases of.*—Equity will grant relief in cases of written instruments where there is a plain mistake, clearly made out by satisfactory proof.
2. *Same ; what testimony insufficient to reform.*—A written agreement by the vendor to deliver a lot of cotton to the purchaser at a specified place, after due notice given, fire risk excepted, will not be reformed into one to pay the freight only, when the testimony of the complainant is negatived by that of the defendant, and the only other witness of the complainant testifies that the sale was pending two or three days, and that he did not pay particular attention to what was being said by the parties.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. A. C. FELDER.

This was a bill in equity filed by the appellant, Arnold, against the appellee, Fowler, seeking to amend, correct and reform the contract evidenced by the following instrument in writing :

"Received of Lundy & Lapsley, \$3,235 82, in full for 21 bales of cotton, weighing 12.149 pounds, and I promise to keep said cotton on my plantation under shelter, off the ground, and secure from stock, and further promise to deliver the same at my nearest shipping point or landing, as soon as practicable after being notified to do so.

"April 4th, 1863.

JNO. J. SANDERS."

Endorsed on back as follows : "We transfer the within agreement to D. S. Arnold, January 25th, 1865.

"GOODWIN & ROBINS."

"I transfer the within cotton to Capt. Wm. Fowler, and agree to deliver the 21 bales at Selma after due notice is given. J. J. S. No. 1 to 21. Fire risks excepted.

"D. S. ARNOLD."

so as to make the contract, simply to pay the freight on the cotton to Selma.

The facts alleged in complainant's bill, and in his own testimony and that of Baker, witness for complainant, as well as the answer and testimony of the respondent, Fowler, are fully set out in the opinion.

It was proved, that before demanding the cotton of Arnold, Fowler had sent an agent to get the cotton from the plantation of Sanders, and also sent bagging and rope to a railroad station near by, to pack and bale up the cotton when delivered, but failing to get the cotton, at that time, he sent the obligation to Lundy & Lapsley, who originally bought the cotton, with directions to endeavor to get the cotton from Sanders, delivered. Failing to recover the cotton, Fowler brought suit against Arnold, in the circuit court, for damages, for failure to deliver said cotton, and took judgment by default, Arnold believing that judgment could not be rendered against him at the first term after service, and therefore not appearing. As soon as Arnold discovered his mistake, he employed counsel to defend, and made a motion for a new trial, which being refused, the case was appealed to the supreme court and there affirmed against said Arnold. The sheriff of Montgomery, who was about to levy said execution, at the filing of the bill, on the property of appellants, was also made a party defendant to the bill, and an injunction prayed to restrain him from selling, &c.

On the final hearing, upon bill, answer, exhibits and testimony, the chancellor dismissed the bill, and taxed the appellant with costs. The decree of the chancellor is now assigned for error.

ELMORE & GUNTER, and MARTIN & SAYRE, for appellants.  
WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—Equity will grant relief in cases of written instruments, where there is a plain mistake clearly made out by satisfactory proofs.—1 Story's Eq. Jurisp. § 157; *Gillespie v. Moon*, 2 Johns. Ch. Rep. 595-597; *Lyman v. United Ins. Co.*, 2 Johns. Ch. Rep. 630.

The written agreement, sought to be reformed, is that the appellant Arnold transferred to the appellee Fowler



twenty-one bales of cotton, and agreed to deliver it at Selma after due notice. The mistake alleged is, that Arnold only agreed to pay the freight on the cotton from a certain point on the railroad to Selma, instead of to deliver the cotton at Selma.

The answer, not under oath, denies explicitly the allegation of the bill. Both parties were examined as witnesses. The complainant testifies that the written agreement does not express the terms of the contract, but that it was made after the sale had been concluded, at the office of the defendant, where he had gone to collect the money, and in the hurry and excitement of the moment.

The defendant swears that the writing was made at the counting-room of the complainant, on the day of the purchase, and that it expresses the real contract of the parties; that the exception of fire risk was inserted at the instance of the complainant.

A. R. Baker, a witness for the complainant, deposes that he was present when the sale was made in the store of Arnold. Arnold was to sell the cotton to Fowler at a certain price, not recollected, transfer to him the written obligation of Sanders to deliver it at his nearest depot, which he did, and to pay the freight from the depot to Selma. Fowler was to pay for the cotton, which he did then and there, by paying the money, or giving a check; he thinks he gave a check. Arnold assumed no other liability that he knew of; he was not present when any other contract was made; the negotiations were pending for two or three days. He did not pay particular attention to what was being said by them, but heard them trading, and made the account of sales. He was in the employment of Arnold, and endeavored to make his employer's interest his own. In addition to this evidence for the complainant, there was proof of attempts by the defendant to obtain possession of the cotton without application to the complainant for its delivery, as shown by the letters to him from W. T. Lundie, and his purchase of bagging and rope to fit it for market.

The purpose of the bill is to enjoin the collection of a

judgment at law, obtained by the defendant against the complainant on a written contract, and to substitute, for the written, a parol contract entirely different from the written one, and so affecting the interest of the parties that the defendant, instead of receiving a large sum of money, will recover from the complainant a mere trifle.

This can be done in equity, if the proof is sufficiently clear and cogent. Parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, either where the plaintiff seeks relief affirmatively on the ground of the mistake, or where the defendant sets it up as a defense, or to rebut an equity.—See authorities above quoted.

The obligation of a contract is the intention of the parties, as expressed and understood by them, at the time of its execution. The written evidence of this intention, signed by the party to be charged at the time, is so far superior to parol testimony that the latter can not be admitted until the absence of the former is satisfactorily accounted for. In the case under consideration the testimony of the complainant is neutralized by that of the defendant. The attempts of Fowler to obtain the cotton, prior to a demand on Arnold for its delivery, are circumstances too slight and unmeaning to admit of much consideration. Having the contract of sale of the party in possession, if he could procure the delivery, without application to his immediate vendor, there would be nothing inconsistent with his contract to do so.

The transfer of Sanders' obligation to the defendant, and the testimony of Baker, are the strong points in the complainant's favor. As to the first, it seems that this obligation of Sanders was transferred by Lundie & Lapsley by delivery merely. The next transfer by Goodwin & Robbins, is of "the within agreement to D. S. Arnold." Arnold's transfer to Fowler is of "the within cotton," with an obligation to deliver it at Selma, fire risk excepted. Independently of the stipulation to deliver the cotton, has not Arnold by this agreement undertaken more than the prior assignors? All of the evidence is, that he sold the cotton to Fowler. Is he not liable to him for damages on

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Sanders' default, even if Fowler undertook to apply to him for the cotton? The testimony of Baker tends to limit his liability, but he admits that he did not pay particular attention to what was being said, and that the negotiations for the sale were protracted through two or three days. He and Arnold might have understood the contract as they state it to be, and Fowler, as he claims it to be. There is no proof by the complainant of any circumstances of hurry and excitement on his part at the time of writing his transfer. He placed in the possession of the defendant his own written statement of the extent of his agreement. If either party was unintentionally mistaken, the loss should fall on him who was the cause of the misapprehension. We do not think the evidence of mistake is so conclusive as to justify the proposed alteration of the written contract.

The other grounds of relief are negatived by the answer, and supported and denied by the testimony of the parties only.

The decree is affirmed.

## FITZPATRICK, EX'R, vs. HEARNE.

[ACTION ON PROMISSORY NOTE GIVEN FOR PURCHASE-MONEY OF SLAVES.]

1. *Warranty of title to slave; what does not protect vendee against.*—Neither a warranty of title, nor a warranty that slaves sold are slaves for life, protects the vendee from the consequences of revolution, or against the abolition of slavery and the emancipation of the slaves by the government, and the loss of the slaves by either event, is no legal breach of such warranties.
2. *Ordinance No. 38 of the convention of 1867, and ordinance No. 39, last part of paragraph 3; unconstitutionality of.*—Not only the 3d section of ordinance 38 of the convention of 1867, concerning the value of contracts, and for the purchase-money of slaves, is unconstitutional and void, but also the last paragraph of section three of ordinance No. 39 of said convention, that declares "that all judgments rendered in the courts of this State, against defendants, where the consideration was the purchase-money or hire of a slave or slaves, are hereby declared to be null



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and void," is unconstitutional and void ; they both impair the obligation of contracts.

3. *Failure of consideration ; what error to charge as.*—A charge to the jury, in an action on a note given on the sale of slaves, that if the consideration of the note was the price of slaves sold, then there was a failure of consideration, and they must find for the defendant, is erroneous.
4. *Ordinances Nos. 38 and 39 of convention of 1867 ; plea setting up, as defense to action on note given for sale of slaves, bad on demurrer.*—In an action on a note given on the sale of slaves, a plea that sets up the ordinances Nos. 38 and 39 of 1867, is bad on demurrer, because the parts of said ordinances referring to notes given, and judgments rendered on such notes, are unconstitutional and void.
5. *Warranty of title, plea that sets up ; what is good plea.*—A plea that sets up a warranty of title, and that the slaves sold were slaves for life, to an action on a note given for the price of said slaves, and states that the title failed without the fault of defendant, although inartificial, yet in substance is a good plea, and a demurrer to it should be overruled.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JAMES Q. SMITH.

The appellant, as plaintiff, and executor of Mrs. Ann Elmore, deceased, brought suit in the circuit court of Lowndes county, to the fall term thereof, in the year 1867, against the appellee, as defendant, on a promissory note for two thousand two hundred and twenty-five dollars, made by the defendant on the 29th day of April, in the year 1856, and payable to the plaintiff, as executor, &c., as aforesaid, and due twenty-four months after the date thereof.

The defendant filed three pleas to the complaint—1st, non-assumpsit within six years ; 2d, that the said note was made for the purchase-money of negro slaves, sold by the plaintiff to defendant, and that the title of said slaves was warranted by plaintiff to defendant, for the life of said slaves, and that the title failed without fault on his part ; that said note was given for the purchase-money of eight negro slaves, sold by plaintiff, as executor, &c., to defendant ; that there was a failure of consideration, in this, to-wit, that said note and consideration was against ordinances Nos. 38 and 39 of the constitutional convention of Alabama, passed December 6th, 1867.

To the second and third pleas the plaintiff demurred.

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To the first plea, he assigned several causes of demurrer, to-wit: 1st, that said plea set up no fact that was a defense to the said action; 2d, that said plea did not show how the title to said slaves failed; 3d, that the fact that the slaves, forming the consideration of the note sued on, were emancipated from slavery, by the government of the United States, and the government of the State of Alabama, constituted no defense to the action, because, the said ordinances were unconstitutional and void; and, 4th, that the fact that the consideration of the note was the sale of slaves, by plaintiff to defendant, was no defense to the suit.

To the third plea, the plaintiff assigned the causes following, to-wit: 1st, that the facts stated in said plea did not constitute a defense to the suit; 2d, that the said ordinances were in violation of the constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

The demurrer to these pleas was overruled; and, thereupon, the plaintiff took issue on said pleas.

On the trial, the court gave three charges to the jury, which were excepted to by the plaintiff, and a bill of exceptions was taken, which sets out all of the evidence on both sides. The first charge was, that if "the jury believed the note was given by defendant to plaintiff in consideration of slaves sold by plaintiff to defendant, then there is a failure of consideration, and no action can be maintained thereon, and you must find for the defendant."

It is unnecessary to set out the second and third charges, as they are not considered in the opinion.

Overruling the said demurrer, and the charges of the court to the jury, are assigned for errors.

FITZPATRICK & WILLIAMSON, for appellant.

COX, WITCHER & RUGELEY, *contra*.

PECK, C. J.—The demurrer to the third plea should have been sustained; the matters stated in it constitute no defense to the action. The third section of the said ordinance No. 38, which refers to notes, &c., given for and in

consideration of slaves, has been decided at this term, in the case of *McElvain et al. v. Mudd, Adm'r, &c.*, to be unconstitutional and void. Ordinance No. 39, referred to, does not apply to such a case as this. Its objects and purpose are, to declare judgments on certain penal statutes void and inoperative, and that new trials should be granted on certain judgments, where meritorious defenses existed, except the latter part of the third and last section, which "declares that all judgments rendered in any of the courts of this State, against defendants, where the consideration was for the purchase-money or hire of a slave or slaves, are hereby declared to be null and void."

The case of *McElvain et al. v. Mudd, Adm'r, supra*, settles the question as to the validity of this part of said section. It is in violation of the constitution of the United States, and, therefore, null and void.—See article I, § 10, part 1, of that instrument. This disposes of the third plea, and shows that the demurrer to it should have been sustained.

2. The second plea raises the question, as to the legal construction and effect of the warranty set out in said plea, and whether it can operate to defeat the recovery of the plaintiff, either in whole or in part. The language of the warranty, as stated in the plea, is, "that the title of said slaves was warranted by plaintiff to defendant for the life of said negro slaves, and that said title failed, without fault on the part of said defendant." This warranty may be said to combine and contain two warranties—1st, that it is a warranty of title; and 2d, a warranty that the said negroes were slaves for life. This plea, although very artificially drawn, I am inclined to consider a good plea, in substance, and that the demurrer to it was properly overruled. A demurrer was not the proper way to present the question, that the plaintiff intended and desired to have settled. But as the question, if not disposed of now, will, no doubt, be made in the right way on another trial, and as it is a question greatly perplexing the people, I propose to go on and dispose of it at this time.

We know in what the breach of these warranties is supposed to consist, to-wit: that the institution of slavery has



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been abolished, and the slaves themselves emancipated by the government of the State, and of the United States. The question, therefore, arises, do these warranties protect the vendee, on the sale and purchase of slaves, from the consequences of revolution, or the abolition of slavery by the government of the United States, or of the State, or both? We are prepared to hold, they do not; that neither of these warranties were, in legal contemplation, broken by the abolition of the institution of slavery and the emancipation of the slaves. If slavery for life ever existed in this country, which I can hardly believe any one is so bold as to seriously deny, then the vendor in this case, at the time of this sale, had an estate in fee in the slave sold. If he had not, what estate, then, did he have? Was it an estate for years, or for life? Such estates presupposes the fee to be in some other person. I use the word fee, as the best word to express my meaning, as, accurately speaking, there is no such thing as an estate in fee in things personal; that estate grew up out of the feudal system, and had relation to things real only; and in the quaint doggerel of olden time, an estate, or tenant in fee, was defined as follows:

“A tenant in fee is he who,  
Without fear or griever,  
Hath lands and hereditaments,  
To himself and heirs forever.”

These slaves, at the date of the sale, were as really slaves for life, as they were twenty or fifty years before, if they were so old; and if any one in this country ever owned slaves for life, such was the character of the vendor's title to those slaves at the date of the sale. We are, therefore, without hesitation, prepared to decide, that neither of those warranties, nor both together, protected the vendee against the abolition of slavery by the government. Such a contingency did not enter into the contemplation of either the vendor or vendee at the time of the sale, nor did it form any element in the contract of warranty.

It is in vain to look for authorities in such cases as this, as there never was, before the occurrence of such an event as the recent emancipation of the slaves in this country.

We must, for this reason, rest our decision upon the nature and common sense of the case. The nearest approach to such an event, is found in the emancipation of the slaves by Great Britain in her West India possessions. In that case, the government gave to the owners a mere pittance for the loss of their slaves, amounting to little, if any more, than half the estimated value of the slaves. If such warranties had been supposed to extend to, and protect purchasers against, the acts of the government, we might expect to find cases where purchasers declined to receive the sum offered by the government, and relied upon their warranties, and endeavored to hold their warrantors liable on the same.

This would, necessarily, have given rise to suits for that purpose, and then the cases would have found a place in the books of reports. But, so far as I know or believe, no such cases are to be found in the books, and this, I think, persuasive, if not conclusive, to show that the English jurists did not believe that such warranties protected purchasers against the acts of the government.

If it be said in answer to this, that the British parliament is omnipotent, I reply, admitting all this, which I by no means admit, certainly the people in this country have all the powers that belong, or ever did belong, to parliament ; and they can legitimately, in their eminent sovereignty, do all that parliament can do.

We have declared in our bill of rights, "that all political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit." But, to me, it seems little short of blasphemy, to say that any created being is omnipotent. Omnipotence is an attribute of the Almighty only—an attribute of Him who created the heavens and the earth, and all things that therein are, and made man in his own image. Omnipotence, therefore, belongs only to the Creator, and not to the creature. But it has never been seriously doubted that the government, especially of the State, when it existed, possessed the power to abolish the institution of slavery. The power that can create, can, certainly, destroy.

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 Ex parte Norton & Shields.
 

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The charge of the court, "that if the note in this case was given in consideration of slaves, then there is a failure of consideration, and no action can be maintained thereon," is erroneous. I do not notice the other two charges, because I do not think plaintiff has any cause to complain of them.

There is no defense in this case under the statute of limitations. We have decided at this term, in the case of *Coleman v. Holmes*, that the statute of limitations was suspended in this State from the 11th day of January, in the year 1861, to the 21st day of September, 1865, that being the period within which no legal civil courts existed, in which the people were compelled to have their cases adjudicated. This period being deducted, six years had not elapsed between the maturity of the note and the commencement of this suit.

For the errors in overruling the demurrer to the third plea, and in giving the first charge to the jury, the judgment below is reversed, and the cause remanded for a new trial, at the costs of the appellee.

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### EX PARTE NORTON & SHIELDS.

[APPLICATION FOR MANDAMUS TO COMPEL JUDGE OF CITY COURT TO VACATE AND SET ASIDE AN ORDER SETTING ASIDE AND VACATING A JUDGMENT, RENDERED BY IT IN 1865, AND GRANTING A NEW TRIAL THEREIN.]

1. *State, domestic affairs of; by whom controlled.*—The legal, rightful, legislative power of the State, subject to the constitution and laws of the Union, must control the domestic affairs of the State. This power does not exist in the courts of the State, or in any other department of the State government, except the legislative department.
2. *Government de facto, European theory of; how can only be engrafted into our laws.*—It is unwise and dangerous to the peace and safety of the people to attempt to incorporate into our system of laws, except by direct enactment, the European theory of *de facto* governments. No authority is due to the acts of any government in the American Union



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which the people have not freely ordained and established, under the authority of the laws and constitution of the Union.

3. *New trials; in what cases can be rightfully authorized.*—The legislative power of the rightful government of the State has the right to authorize the grant of new trials, in judgments rendered in the so-called courts of the insurgent government, existing in this State after the 11th day of January, 1861, and until the complete and full restoration of the loyal, rightful government of the State.
4. *Same; what sufficient cause for granting.*—It is sufficient cause for granting a new trial in a judgment rendered in a court of said insurgent government, that the court which rendered such judgment, was a court created by said insurgent government, and the judge who presided was an officer appointed by said insurgent power; and that the cause of action was the supposed breach of a warranty of soundness of a person sold as a slave in this State, after the first day of January, 1863; that the damages in said judgment were admeasured in Confederate money; that the defendant was a female and widow, and that the so-called court sat within a city of this State, then occupied as a military post by the insurgent soldiery.
5. *Same; affidavit in support of application for new trial, what notice need not be given in relation to.*—Under ordinance No. 39 of the convention of 1867, and the acts of the legislature, in relation to the granting of new trials, it is not necessary that the parties adversely interested should be notified of the time and place of the taking of the affidavits in support of the application for the grant of a new trial.

This was an application for a writ of *mandamus*, or other appropriate writ or process, to compel Hon. John D. Cunningham, judge presiding in the city court of Montgomery, to vacate and set aside a certain order made by said court, vacating and annulling a judgment rendered in a cause in said court in February, 1865, wherein Norton & Shields were plaintiffs, and Mary C. Pierce, defendant, and granting a new trial therein.

The judgment set aside was rendered in February, 1865, by default, and was based on an action for a breach of warranty of soundness of a slave, sold to the plaintiff in August, 1863.

The affidavit of the defendant, Mrs. Mary C. Pierce, after showing the soundness of the slave at the time of sale, states that the price paid in Confederate currency was not worth more than \$400 in lawful currency; that the damages awarded in the judgment against her amount to \$2,464, besides costs, which damages were estimated in Confederate money; that suit was brought against her shortly be-

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fore said slave died, that she is a widow and unacquainted with the proceedings of courts ; and therefore did not have counsel in time to defend said suit, in which judgment by default was rendered against her, and that she did not know that any such judgment had been rendered against her until March, 1868. Along with this affidavit, others were submitted to prove the soundness of the slave at the time of the sale. To the introduction of the affidavits, except that of Mrs. Pierce, objection was made, on the ground that said affidavits were *ex parte*, and the plaintiffs in the judgment had no opportunity of cross examining said witnesses. This objection was overruled, and plaintiffs excepted.

The other facts of the case are set out in the opinion.

ELMORE & GUNTER, *pro* motion.

STONE, CLOPTON & CLANTON, *contra*.

PETERS, J.—This application involves an inquiry into the sufficiency of a judgment purporting to have been rendered by a court of the rebel government having control of the territory of the State of Alabama, during the late insurrection in the Southern States of the Union. If the court in which this judgment was rendered was a legal tribunal, then its judgment was legal also, and it is entitled to all the protection of a legal adjudication. But if it was an illegal court, then its judgment was invalid as a judgment.

This court will take judicial notice of the facts which make up the history of the State in regard to the government that may at any time exercise control within its boundaries, whether it be legal or illegal.—*Bank of Augusta v. Earle*, 13 Pet. 519, 590 ; *Taylor v. Barclay*, 2 Sim. 221 ; 1 Greenl. Ev. ch. 2, § 5. It is then known to this court, that, on the 7th day of January, 1861, a convention assembled in the city of Montgomery, in this State, under authority of a proclamation of the Governor of the State of Alabama, and on the eleventh day of January, of the same year, this body passed an ordinance entitled, "An ordinance to dissolve the Union between the State of Ala-

bama and the other States united under the compact styled the constitution of the United States of America." This convention styled itself "a convention of the people of the State of Alabama." By it the rightful State government was overthrown, and a new insurrectionary government was set up in its stead.—6 Wall. 13, 14. The chief purpose of this extraordinary movement was to form "a southern slaveholding Confederacy," in which "no slave" could "be emancipated by any act done to take effect in this State or any other country."—Ordin. & Const. of Ala. 1861, article *Slavery*, § 1, part 2, ch. 3, § 2, pp. 106, 111. The constitution of the new government, thus erected within the territories of the State of Alabama, purports to have been "adopted by the people of Alabama, by the unanimous vote of their delegates in convention assembled, at the capitol, in the city of Montgomery," on the "twentieth day of March, in the year of our Lord, one thousand, eight hundred and sixty-one, and of the Confederate States of America, the first year." This new government, thus established, repudiated any obedience to the government of the United States, and assumed a relation of hostility to its constitution and its laws. It took upon itself also the attitude of a government, independent and foreign to the United States, and levied actual war, by military force, against this latter government, in order to maintain its new position.

Under this insurrectionary organization, all the officers of the former rightful government of the State of Alabama were continued in the discharge of the duties and functions of their several offices, as they existed before the ordinance of secession was passed. The judges and courts of the rightful State government, after this change, were incorporated into the new organization as a part of its administrative machinery. The courts became a branch of the insurrectionary government, as much so as any other department of the rebel organization.—Pamph. Seces. Ordin. p. 28, No. 16. The courts of the United States were expelled, and their jurisdiction and dockets transferred to the courts of the rebel government.—Pamph. Seces. Ordin. p. 22, No. 14. This new rebel government in the State of



Alabama connected itself with a political organization of other insurrectionary governments in certain other States of the Union, which styled itself, in its constitution and laws, "The Confederate States of America." This latter also claimed to be independent, foreign and hostile to the constitution and government of the United States.—Pamph. Secession Ordin. and Const. of Confederate States, pp. 127, 113, 32. The career of the so-called "Confederate States of America" lasted from the adoption of their provisional constitution, in March, 1861, till May, 1865, when the organization was broken up and dispersed by the military forces of the United States. The rebel government in the State of Alabama, set up by the secession convention of 1861, formed a member of the Confederate States government, during the whole period of its existence, and it was actively engaged in carrying on open and flagrant war against the government of the United States, by all its departments. The courts were empowered and charged to aid the rebellion by giving credit and circulation to the treasury-notes of the so-called "Confederacy," and to punish by their judgments, as felonies, certain acts connected with desertions from the rebel armies.—Pamph. Acts 1861, p. 53, No. 54; Pamph. Acts 1863, p. 13, No. 3, § 7. Thus the courts were as much a part of the machinery of the rebellion as any other department of the insurrectionary administration. They were not the courts of the rightful State government continued under the rule of the *de facto* government of the insurrection, as the English courts were under the reign of Cromwell. But they were organized for unconstitutional and illegal purposes of the most fatal and criminal character. They were not established to prevent anarchy, but to aid the rebellion. They were utterly forbidden by law, and were destructive usurpations of the powers of the rightful government; and their officers and their acts were wholly without any legal warrant, except such as the rightful government might see fit to accord to them, on its restoration. The government, of which they formed a part, was beyond all question illegal in all its departments.—*Texas v. White*, 7 Wall. 700, 732. Admitting, then, as we must admit, that the rebel government, in this

State, was illegal, the fate of the judgments of its courts is most emphatically and correctly declared by Chief-Justice Taney, in the case of *Luther v. Borden*. Contrasting the two governments in Rhode Island, at the date of the Dorr rebellion, in that State, he says: "For if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence, during the time mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time were nullities; its taxes wrongly collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and judgments of its courts, in civil and criminal cases, null and void, and the officers who carried their decisions into operation answerable as trespassers, if not, in some cases, as criminals."—7 How. 39. This strong expression of opinion no where gives countenance to the pretension that an illegal, insurrectionary government may become legal by assuming a *de facto* character. If any validity is given by the courts to the enactments and judgments of such an illegal government, even when it is not organized for purposes of rebellion, this must be in consequence of subsequent ratification by the rightful, legal government. The acts of the illegal government, however it may be erected, may be ratified; and they need ratification to make them valid.—*Scott v. Jones*, 5 How. 343, 376, 378; 7 How. 55, 56. The better opinion seems to be, that the ratification of a judgment of an illegal and void court can not be accomplished by an act of legislation, because this is a judicial act, and the legislature has no judicial authority.—*Cooley on Const. Limit.* 107. In this instance, the court that rendered the judgment was illegal and void, and there has been no legal ratification of the judgment, by any authority competent to make it, since it was rendered. The convention that reconstructed and restored the rightful government of the State, refused to make any such ratification, except as shown in ordinance 39, entitled "An ordinance to declare void certain judgments, and to grant new trials in certain cases therein mentioned," passed December 6th, 1867.—

Pamph. Acts 1868, pp. 186, 229. The ordinances of the convention of the 12th of September, 1865, can not be regarded as laws, except so far as they have been adopted or re-enacted by the rightful legislative authority, since the restoration of the legal government. And this could not be done, so far as the judgments of the courts of the rebel government were concerned. There was no authority vested by law in provisional Governor Parsons to order the assembling of a convention, and its acts were not accepted or ratified by the supreme government, and the whole proceeding was utterly void. A mere convention of the people, assembled without competent authority, can neither make laws nor establish lawful governments in the States or territories of the United States. It requires legal authority in the first instance, or subsequent legal ratification to give such proceedings validity. The power is in congress to accept and acknowledge the government thus formed, and in the rightful State authority, on its restoration, to adopt, re-enact and ratify the laws enacted by such irregular bodies.—*Scott v. Jones*, 5 Howard, 343; *Luther v. Borden*, 7 How. 1, 42, 47, 48, 49; *Dorr's Trial*, pp. 130, 131, *et passim*; *Cooley*, 29, 30, 31; 24 Ala. 100. The right to decide what government in a State or territory of the Union is the legal rightful government is in congress, and not in the courts.—7 How. 44, Taney, C. J. And congress has decided that the proclamation government of this State was illegal.—*Reconstruction Acts 1867*, Statutes at Large, pp. 428, 429. This seems to me to be the only correct conclusion that can be drawn from the authorities above cited, and from the relations of the governments of the States of the Union to that of the United States.

The granting of new trials is a part of the remedy, and it is the province of the legislature to prescribe and control the remedy by law. "And without impairing the obligation of a contract, the remedy may certainly be modified as the wisdom of the nation shall direct."—4 Whea. 122. It is from legislative authority that the court derives its power to grant new trials in any case. Even where they have been granted under the practice at common law, it is because the common law has been adopted by the legis-



lative department of the government.—3 How. 212. It is the purpose of the remedy to aid “the attainment of fair judicial investigation, correct administration of justice, and the just and equitable execution of judgments.”—*Ex parte Pollard*, 40 Ala. 77, 103. The allowance of a new trial tends to this end, and it does not impair the obligation of the contract on which the judgment is founded. It is permitted simply for the protection of right by “the correct administration of justice.” It is impossible that this purpose can impair the obligation of a contract, unless the contract itself is for an unjust purpose, and therefore void. 2 Par. on Contr. p. 746, *et seq.*

Legislation governing the practice in the allowance of new trials can not, therefore, be obnoxious to the objection of unconstitutionality. And in accordance with this view has been the repeated decisions of the highest courts of the Union for many years. In the case of *Sempeyreac & Stewart v. The United States*, (7 Pet. 222,) the courts of the general government, in the territory of Arkansas, were authorized to hear and determine, on bill in chancery, the validity of certain grants of land made in the territory of Arkansas, acquired by the Louisiana purchase, before that vast tract of country became a part of the United States.

The law of congress conferring this jurisdiction upon the superior courts of the territory of Arkansas, made the decrees of these courts in such cases final, if not appealed from in one year after the same might be rendered. A bill was filed under this law, which was passed in 1824, in the name of Sempeyreac, alleging a grant of a considerable tract of land to him in what is now the State of Arkansas. This grant was confirmed by decree of a court of the territory of Arkansas, at the December term, 1827. Long after this decree was thus rendered, and the right of appeal had been barred by the limitation imposed by this law, a second act of congress was passed conferring jurisdiction on the court, that tried this cause in the first instance, to grant a rehearing on proceedings in the nature of a bill of review, filed or to be filed, for the purpose of revising such decree; and if it appeared that the court had assumed jurisdiction “on any forged warrant, conces-

sion, or order of survey, or other evidence of title, then, in case of such forgery, to reverse and annul any prior decree or adjudication confirming such claim. This latter act was passed in 1830, some two years after the rendition of said decree in favor of Sempeyreac. Yet, in his case, under the act of 1830 abovesaid, a proceeding in the nature of a bill of review was filed, on the part of the United States, and a new trial was allowed; and the prior decree in favor of Sempeyreac was "reversed, annulled, and held for naught." From this latter decree, an appeal was taken to the supreme court of the United States, where it was objected, that the law of congress of 1830, authorizing the bill of review, was unconstitutional. But this objection was not allowed; because the bill of review was a new remedy, in the nature of a new trial, and the law authorizing it was constitutional. It was also declared that congress, the legislative power, had the right to mould its remedies as it pleased. But had the proceeding been by motion or petition for new trial, which is the usual course in a court of law, the effect would have been precisely the same; and it must have been justified and sanctioned by the same principles which gave validity to a proceeding by bill of review. What would justify the one course would justify the other also. *Ubi eadem est ratio, eadem lex.*—Broom's Max.

In *Calder v. Bull*, (3 Dal. 386,) a like conclusion was reached by the same high tribunal. There, a law of the State of Connecticut set aside a decree of the court of probate, and granted a new trial or rehearing in the same court; and on appeal to the supreme court of the United States, this act was upheld to be constitutional by all the judges. It is also settled by the same authority, that a State legislature has the constitutional right to grant a rehearing, which is the same as a new trial, in its own courts. *Balt. & Susq. R. R. Co. v. Nesbit*, 10 How. 395. These decisions come down to 1850, and, so far as I know, remain unshaken in principle or logic to this day. They fully justify the validity of the ordinance and act of the general assembly, under authority of which the motion for a new

trial of the case at bar was made and granted. It is true, that the same supreme court decided, in another case, that congress can not by law annul a judgment of the supreme court of the United States, but it is no where intimated that congress can not authorize the allowance of a new trial in the national courts at any time it chooses.—18 How. 422.

In the cases above cited, the courts were legal courts and fully authorized to render the judgments complained of. They were legal judgments of legal courts. In the case at bar, the court was wholly illegal and forbidden by law. Its judge was an illegal officer, and his exercise of jurisdiction was an usurpation, and he acted in defiance of the rightful authority.—*Coleman v. Chisholm*, January term, 1869. The judgment was that of a court of a foreign and hostile government, which was wholly without acknowledgment of the rightful government. It is no where settled, or pretended, that the courts of such a government are entitled to have any constitutional protection whatever. If the court was clothed with no authority, the judgment is a nullity.—*Vide Rose v. Himeley*, 4 Cra. 269. The constitutions, neither of the States nor of the general government, give protection to the judgments of rebel courts, nor to their judges. Then, their judgments are at the mercy of the rightful authority. To say that such a court is necessary for the preservation of good order, and to avoid anarchy, is not enough to surmount the constitutional objection against them. All force, whether rightfully or unrightfully used, relies upon this pretense. It is the key-note of all rebellions. If these tribuna's, thus attempted to be set up, are foreign and wholly unrecognized by the proper political authority, this fact of their necessity can not be taken for granted; it must be proved. This court has no right to infer it—that is, their necessity is a fact that must be proved.

Then, turning to the consideration of ordinance No. 39, of the convention of this State, of November, 1867, it declares, “that in all cases where judgments or decrees have been rendered since the 11th day of January, 1861, to this date, (Dec. 6, 1867,) the party against whom such judgments or decrees have been obtained shall be entitled to a



new trial upon affidavit showing a meritorious defense ; *provided*, the court shall be satisfied from all the facts that may be submitted by both parties, that a good and meritorious defense exists."—Pamph. Acts, 1868, pp. 186, 187. The act of October 10, 1868, extends the time of opening such judgments for a new trial, as above said, to the 26th day of June, 1869, and directs that the application for the new trial may be made in vacation, and that it shall be "sustained by affidavit showing probable cause for a meritorious defense."—Pamph. Acts 1868, p. 269, No. 48.

Then, do the facts of this case bring it within the relief of the rule above declared and established, by ordinance No. 39? I think they do.

This application for a new trial was made within the time prescribed by law, and in the manner directed by the ordinance and act above referred to. The judgment sought to be opened for a new trial was rendered in a rebel court, as the bill of exceptions and record show, on the 16th day of February, 1865, and "of the independence of the Confederate States of America, the first year." And it is also shown, that the Hon. Benajah S. Bibb was the person who presided as judge of said court. This court was established by the rebel legislature after the secession of the State, by an act which purports to have been approved December 7th, 1863.—Pamph. Acts 1863, p. 121, *et seq.* And the honorable and worthy citizen who acted as such judge was appointed to his office by the rebel authorities. On the motion for new trial, both parties appeared in the court below wherein the application was made, and each filed several affidavits in support of their respective pretensions. Some objection was made by the plaintiffs in the original judgment to the *ex parte* character of a portion of the affidavits filed by Mrs. Pierce. It was objected, that no notice of the time and place of taking these affidavits was given to the adverse party to the motion. The ordinance and act of the legislature, which authorize this proceeding, do not seem to contemplate the necessity of any such notice. The application is simply to be sustained, "by affidavit showing probable cause for a meritorious defense." This showing may be met by similar affidavits or

other testimony submitted by the adverse party. And if the court "is satisfied from all the facts that may be submitted by both parties, that a good and meritorious defense exists," the applicant shall be entitled to a new trial; and it is the duty of the court to grant it. The technical objections to the manner of taking the affidavits of the applicant for a new trial in the court below, were, therefore, properly overruled.

The affidavit of Mrs. Pierce, in support of her application for a new trial, shows that she had not only probable grounds for a meritorious defense, but a sufficient defense to the whole action. The suit against her was based upon a contract of warranty of soundness of a negro man, sold as a slave since the first day of January, 1863. She mentions the transaction as one that had occurred about the 29th day of July, 1863. The record of the judgment shows that it happened on August 13th, 1863. This was after the emancipation of the slaves in this State by the government of the United States. The whole contract of sale and the warranty were void, having been entered into after the person sold had been set free.—*Nelson v. Morgan*, June term, 1869; *Texas v. White*, 7 Wall. 700, 728. It also appears that the sale had been made for a sum in Confederate treasury-notes, which was greatly above their true value in specie, or in any currency of the United States, which would be good as a legal tender for the payment of debts. The court of a government organized to secure the perpetual existence of slavery, and which depended, in a great degree, for its most available resources, for means to discharge its daily expenditures, on the paper issues of its treasury, as notes and bonds, would not have listened to any plea that assailed the institution of slavery, or the value of Confederate money. Yet the proper pleas in this case would have required an allegation that slavery had ceased to exist in this State at the date of the contract forming the basis of the suit, and that the specie or legal currency value of the damages on a broken warranty, was much less than the exorbitant sum adjudged to be due by the judgment complained of, estimated by the Confederate

standard, which had been the measure of the price of the person sold as a slave.—*Fath v. Bliss*, June term, 1869.

The judgment is for twenty-four hundred and sixty-four dollars, which means legal money. And it is evident that the damages recovered were estimated by the nominal sum in dollars paid in Confederate money as the price of the person sold as a slave. But this sum was really in Confederate treasury-notes, and was no fair measure of the damages in specie or national currency, which was the only true standard.—*Thorington v. Smith*, U. S. Sup. Court, 1869. And although it is not known to this court that any pleas which involved the existence of slavery, at the date of this sale, and the utter worthlessness of Confederate treasury-notes at the date of the judgment, would have been rejected in the rebel court that tried this cause, yet enough is known to justify the declaration that the interposition of such pleas would not have been a safe proceeding at that date. It is known as a part of the history of the rebellion that the men who were held in bondage were sometimes killed, when they attempted to escape from slavery, to prevent such escape; and that all attempts to impeach the value of what was called "Confederate money" were regarded with very great disfavor by the military authorities of the Confederate States, who really ruled the country quite as they pleased, with but very little regard to the civil authorities, or the rights of the individual citizen. In one or two instances the refusal to accept Confederate treasury-notes, in payment of debts, was made a penal offense, triable by courts martial, by the military edicts of officers high in military authority.—Gen. Bates' order in Alabama; Gen. Van Dorn's order in Mississippi; Gen. Herbert's order in Texas. And though these measures were ordered to be rescinded and abandoned, it was always unsafe to violate them, near a military post of the rebel government, as would have been the case in this instance. Then, it is almost beyond doubt that the pleas necessary for a legal defense of this action in the rebel court, where it was tried, would not have been permitted to avail as a defense.

I therefore do not doubt, that the facts set forth in the affidavit of Mrs. Pierce, made in support of her application,



which are not successfully controverted, show a good and sufficient defense; and, consequently, the order granting her a new trial was properly made.

The rule for a *mandamus* is therefore denied, at the costs of the applicants for the same.

PECK, C. J., concurred in the result, without assenting to all the reasoning in the opinion.

SAFFOLD, J., not sitting.

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## BURGESS *vs.* THE STATE.

### [INDICTMENT FOR MALICIOUS MISCHIEF.]

1. *Indictment, containing but one count, for malicious injury to a "mare and an ox"; what proper charge on trial of.*—On the trial of an indictment, for malicious mischief, containing but one count for an injury to "a mare and an ox," proven to have been committed at different times, it is error to refuse to charge that "if the State had failed to prove that the mare and ox were injured at the same time, or so near each other as to constitute the same offense, then the defendant is not guilty, as charged in the indictment."
2. *Same; when charge must be proved as laid.*—An indictment for malicious mischief should charge such offenses in two counts, or in the alternative in the same count; or the charge must be proved as laid.

APPEAL from the Circuit Court of Talladega.  
Tried before HON. CHARLES PELHAM.

The appellant, Burgess, was indicted at the fall term, 1868, of the circuit court of Clay county, for maliciously and unlawfully disabling and injuring a mare and an ox, the property of David G. Thomas. The indictment was returned into court on the 18th day of September, 1868, and charged the injury to the animals as one offense, in a single count. On the application of the defendant, the trial of the case was transferred to the circuit court of Talladega, where a

trial was had, on issue joined on the plea of not guilty, and defendant found guilty, and sentenced to six months hard labor for the county.

On the trial, as appears from the bill of exceptions, the State adduced testimony tending to show various injuries to the cattle, sheep, fences, fodder, &c., of said Thomas, in 1865-6, and the killing of his ox in 1866; to the admission of all of which testimony the defendant objected, but the objection was overruled and defendant excepted. The State then introduced one Jane Mitchell, who testified that defendant "had a hankering for her, and was jealous of Thomas, and accused witness of allowing him too many privileges," and that in 1866, at the time when her fence, as well as Thomas', was burnt, the defendant told her that "the fence was burned so as to make Thomas work harder, so as not to have time to attend to her;" that defendant then asked witness, what she and Thomas would do for a team, and upon witness saying that she had a mare and and Thomas had one, and that they would put them together, the defendant replied, that "the horses could go up like the ox, and he would break them up, unless witness would drive off Thomas." To the admission of this evidence, the defendant objected, but the objection was overruled, and defendant excepted.

The State then proved, by several witnesses, an injury in the summer of 1867, in Clay county, to a mare, the property of said Thomas, by a cut on the inside of the foreleg; and also an injury to an ox, also the property of Thomas, in the fall of the same year, by a cut on the hamstring. The defendant objected to the admission of this evidence, but the objection was overruled and defendant excepted. This was all the evidence in relation to the injury inflicted upon the mare and the ox.

The other evidence introduced by the State, mainly circumstantial, tending to prove the defendant guilty, and various objections to the admission of evidence, as also a motion in arrest of judgment, it is unnecessary further to notice, in the view which the court took of this case.

The admission of the evidence objected to, and the

refusal of the court to give a charge which is set out in the opinion, are assigned among other rulings, for error.

J. T. MAY, and J. HENDERSON, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—This was an indictment in the circuit court for malicious mischief. The accusation contains but one count. It is in the following words :

“The State of Alabama,	}	Circuit Court,
Clay county.	}	Fall term, 1868.

“The grand jury of said county charge, that before the finding of this indictment, Francis M. Burgess unlawfully and maliciously disabled and injured a mare and an ox, the property of David G. Thomas, against the peace and dignity of the State of Alabama.”

The section of the statute under which the indictment was found is as follows :

“Any person who unlawfully and maliciously kills, disables, disfigures, destroys or injures any animal, or other article or commodity of value, the property of another, must on conviction, be fined not less than twenty nor more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county, for not more than six months.”—Rev. Code, § 3733 ; Penal Code, § 186.

A crime or public offense is an act done or an omission to act, which is forbidden by law, and which is punishable by death, by fine or imprisonment, or both by fine and imprisonment.—Rev. Code, § 3540.

And an indictment is an accusation in writing, presented by the grand jury of the county in which the crime has been committed, charging a person with an indictable offense. Const. of Ala. 1867, art. I, § 8 ; Rev. Code, §§ 4109, 4112, 4120, 4121, 4125, 4128, 4108.

This accusation constitutes the charge against the person alleged to be guilty of the crime on which the indictment is founded, and it should be “so set forth as to leave no doubt concerning its nature and its limits, and leave it im-



possible for the accuser to vary it in the course of the hearing."—1 Bish. Crim. Procd. p. 40, § 40.

In this case, the act complained of, is the "disabling or injuring" "a mare and an ox, the property of David Thomas." If these animals had been separately disabled or injured, it should have been so charged in separate counts in the indictment, else much confusion may arise in such cases. The injury to the mare was one offense and the injury to the ox was another, unless perhaps the injury to both was the result of one act. The indictment is not demurrable, because the act which constitutes the crime may be committed as charged—that is, the two animals may be injured at the same time and by one act. But if it is so alleged, it must be so proven. The plea in answer to such an accusation is that the accused is not guilty as charged in the indictment. It is not that he has not violated the statute in any manner, but that he has not violated it as set forth in the accusation. If this is not required, then an indictment charging that a person, with criminal intent, had violated a particular section of the penal law would be sufficient. But this would be a departure from the forms laid down in the Code, and also the important rule of criminal procedure above quoted.—Rev. Code, §§ 4141, 4109, 4112, 4119, 4125.

The animals injured were different animals, and the injury to each is a different offense, and though such offenses may be joined in the same count, as they are of the same grade, yet if both offenses are charged in the same count, they should be charged in the alternative. The rule prescribed by the statute is this: "Where offenses are of the same character, and subject to the same punishment, the defendant may be charged with either in the same count, in the alternative."—Rev. Code, § 4125. A work of high authority lays it down as a rule, that two offenses can not be charged in the same count; the count in such a case would be bad for duplicity.—Arch. Cr. Pl. pp. 95, 96. This rule, applied to the statute last above quoted, would require that the injury to the mare and the injury to the ox should be charged in the alternative, and not conjointly, as has been done in the count, above set out, of the indictment in this

case. And the charge having been made conjointly of an injury to "a mare and an ox," must be proved as it has been laid. If this were otherwise, two or more convictions, or any number of convictions, might be had upon a single count. This does not seem to have been the purpose of the statute above quoted, regulating the joinder of offenses in the same count.—Revised Code, § 4125. Under that statute but one conviction can take place upon each count. But here, unless the offense consists of the joint injury of the two animals, two misdemeanors are charged and two convictions may be had.

The evidence objected to tended to show two offenses. The injury to the mare, which occurred in the summer of 1867, was clearly barred by the statute of limitations.—Revised Code, § 3952; *Mallett v. the State*, 33 Ala. R. 408. The indictment was not returned into court by the grand jury until September 18th, 1868; more than one year after the commission of the injury to the mare. This was too late. The offense was a misdemeanor, and it was barred in one year.—Rev. Code, §§ 3541, 3542; 33 Ala. 408. The injury to the ox occurred in the fall of the same year; that is, in 1867. So, the proofs introduced and objected to, show that it did not tend to establish the particular offense charged in the indictment. It should have been rejected. The evidence of the killing of the dog, the sheep, and the burning of the fence and cutting down the corn in 1865 and 1866, was improperly admitted, except for the purpose of showing malice on the part of the accused towards Thomas, the owner of the animals alleged to have been injured.—*The State v. Crowley*, 13 Ala. 172; *Lawson et al. v. The State*, 20 Ala. 65.

The court was asked by the defendant below to charge the jury in this case, "that if the State had failed to prove that the mare and ox were injured at the same time or so near to each other as to constitute the same offense, then the defendant is not guilty as charged in the indictment. This charge the court refused to give. This was error.

For this error, the judgment and sentence of the court below is reversed, and the cause is remanded for a new

trial, and the defendant will appear in the court below, as required by law, and answer such charge as may be preferred against him, until legally discharged.

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FREE *vs.* HOWARD, ADM'R.

[ACTION COMMENCED BY ORIGINAL ATTACHMENT.]

1. *Attachment; how only can be abated.*—An attachment without affidavit and bond, can only be abated on plea of the defendant, filed at the return term. A motion to quash should be overruled.
2. *Clerical misprision; what will be held to be.*—The test of a writ of attachment being the words, "Witness, W. P. S., clerk of said *circuit* court," when the writ is returnable to the city court, and recites that complaint on oath had been made "to me, W. P. S., clerk of the city court;" the word *circuit* will be considered a mere clerical error, cured by the judgment, if not previously objected to. *Quere.*—Whether the clerk of the circuit court may not issue an attachment returnable to the city court within his county.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN D. CUNNINGHAM.

The facts are sufficiently stated in the opinion.

FALKNER & MOLTON, for appellant.

CHILTON & THORINGTON, *contra*.

B. F. SAFFOLD, J.—This suit was commenced by attachment by the appellee's intestate against the appellant, returnable to the October term, 1866, of the city court of Montgomery. The transcript shows that the affidavit was made before the clerk of the city court, and the ground for the issuance of the attachment was stated to be, that the defendant was endeavoring fraudulently and clandestinely to dispose of his effects. At the October term, 1867, the defendant moved to quash the attachment for want of a



proper affidavit and bond, and because those on file were illegal. This motion was overruled. At the October term, 1868, the court, on motion of the plaintiff, who is the appellee, rejected a paper purporting to be a plea in abatement for the reason that it was placed among the papers in the cause at the February term, 1868, and had never been marked filed by the clerk.

The motion to quash the attachment, for the reasons given, was properly overruled. An attachment issued without affidavit and bond can only be abated by plea of the defendant.—Rev. Code, § 2989; *Kirkman & Rosser v. Patton*, 19 Ala. 32; *Jones v. Pope*, 6 Ala. 154. That the bond and affidavit were illegal, without specifying in what particular, is the statement of a legal conclusion.

There was no error in rejecting the paper purporting to be a plea in abatement. It should have been filed at the return term.—Revised Code, § 2939; *Vaughan v. Robinson*, 22 Ala. 519.

The third assignment of error is not sustained by the record. The judgment entry recites that the complaint was duly filed at the return term, and the amended transcript shows a complaint.

The fourth assignment is not well taken. The action was founded on an instrument of writing ascertaining the plaintiff's demand, and the judgment could be entered by the clerk without the intervention of a jury.—Rev. Code, § 2770.

The fifth and sixth assignments are not sustained by the record. It is true, the test of the writ of attachment is in the words, "Witness, Wm. P. Smith, clerk of said *circuit court*," &c.," signed "Wm. P. Smith, clerk." But the writ was returnable to the city court, and recited that complaint on oath had been made "to me, W. P. Smith, clerk of the city court." The use of the word "circuit" is so clearly a clerical error, which could have been amended if called to the attention of the court, that we can not allow the objection to prevail.—Rev. Code, § 2990.

*Quere.*—Whether the clerk of the circuit court may not issue an attachment returnable to the city court within his county.—Rev. Code, §§ 2929, 645, 771.

The judgment is affirmed.

NOTE BY REPORTER.—At a subsequent day of the term, Messrs. Falkner & Molton, for appellant, applied for a rehearing, arguing that the clerk of the city court had no authority to issue an attachment. The following response was made thereto, by

B. F. SAFFOLD, J.—The question presented by the appellant, in his application for a rehearing, was not made in the city court, and was not put in issue by his assignment of errors. His appearance and defense of the action gave the court jurisdiction of the cause, whether the process by which he was brought in was valid or void. A judgment has been rendered against him which entitles the plaintiff to subject the property attached to an execution. The authority of the clerk of the city court to issue an attachment may not arise again, and it is unnecessary to decide the question.

A rehearing is denied.

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NOTE BY REPORTER.—At the same time with above case, there was decided another from the same court, submitted at the same time, involving the same questions, with but one exception, which appears in the opinion. It is accordingly here reported.

### FREE *vs.* HUKILL, SURVIVING PARTNER.

[ACTION COMMENCED BY ORIGINAL ATTACHMENT.].

1. *Section 2928 of Revised Code; what statement equivalent to that required by sixth subdivision of.*—In an affidavit for attachment, a statement that the defendant “is endeavoring fraudulently and clandestinely to dispose of his effects,” is equivalent to the case prescribed in the 6th subdivision of section 2928 of the Revised Code.

APPEAL from the City Court of Montgomery.  
Tried before Hon. JOHN D. CUNNINGHAM.

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Snodgrass v. Clark.

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The fact upon which the decision is based will be found in the opinion.

FALKNER & MOLTON, for appellant.

CHILTON & THORINGTON, *contra*.

B. F. SAFFOLD, J.—The questions at issue on error, in this case, are the same as those determined in the case of *Free v. Howard, Adm'r*, at the present term, except that, in the motion to quash the attachment, an additional ground is alleged, to-wit, that the cause for which it was issued is not embraced in the statute.

The affidavit states that the defendant “is endeavoring fraudulently and clandestinely to dispose of his effects,” &c. This expresses the substance of the case prescribed in the 6th subdivision of section 2928 of the Revised Code.

The judgment is affirmed.

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### SNODGRASS vs. CLARK.

[APPLICATION FOR DOWER.]

1. *Dower, allotment of; jurisdiction of probate judge.*—The judge of probate may cause an assignment of dower to be made, when this can be done by *metes and bounds*, without injustice, whether the lands have been aliened by the husband or not.
2. *Same; when probate judge must decline jurisdiction.*—But when the lands have been aliened by the husband, and the wife has not relinquished her dower, then if an assignment can not be made by *metes and bounds, without injustice*, the judge of probate must decline jurisdiction, and the application must be made to the court of chancery.
3. *Improvements on lands; what not sufficient to oust jurisdiction of probate judge.*—Clearing up and putting in cultivation nine or ten acres of land on a tract of 160 acres, and building some houses thereon, is not enough to oust the jurisdiction of the judge of probate, unless it be shown that an assignment of dower, by *metes and bounds*, would be unjust. This court will not presume against the decree of the judge of probate, that such assignment can not be made. There must be clear proof that it would be unjust.



## Snodgrass v. Clark.

4. *Dower; what act barred, in 1840.*—If the wife joined with the husband in a deed in this State, made in 1840, this bars her dower in the land conveyed by such deed.
5. *Admissions of what absent witnesses would prove; effect of.*—When a party, “for the purpose of a trial,” admits that certain absent witnesses, if present, “*would prove the facts stated,*” in an affidavit for a continuance, and which is made a part of the bill of exceptions, the facts so admitted are, to all intents and purposes, the testimony of such witnesses, and for the purposes of the trial, entitled to the same credit as if they had testified in open court. Unless such evidence is impeached or disproved, it must govern the judgment of the court in the same degree as any other testimony. It can not be disregarded without some legal reason.

APPEAL from the Probate Court of Jackson.

Tried before Hon. DAVID TATE.

The facts are sufficiently stated in the opinion.

DAVID P. LEWIS, for appellant.

Neither the transcript nor the docket shows the name of counsel for appellee.

PETERS, J.—All the facts which are necessary to show that Mrs. Clark, who was demandant below, is entitled to dower in the lands in controversy, are stated in her petition to the probate judge. The petition also alleges, that she was the widow of Isaac Clark, and that he died “seized and possessed” of the lands of which dower is claimed. The tract contained one hundred and ninety-six and 70-100 acres. Nothing is said of alienation by the husband during coverture, nor of improvements on the lands since alienation. But it is stated in the petition, that John Snodgrass, the appellant, claimed said lands, as the “alienee” of the husband of the demandant.

Snodgrass was made a party to the proceedings, and objected to the assignment of dower by order of the probate judge; and showed, as grounds of his objection, that the lands in controversy had been sold and conveyed by said Clark, the husband of demandant, to James M. Gullatt, about twenty-eight years before the day of the trial; that Gullatt went into possession of the lands under his purchase, and remained in such possession until he sold the

same lands to contestant, Snodgrass. It was also shown that Snodgrass had continued in possession since his purchase, and was in possession on the day of the trial, which occurred on September 25, 1868, and that Mrs. Clark had joined in the deed to Gullatt.

On the trial, Snodgrass proved that some "nine or ten acres of said land had been cleared up and put in cultivation, and some houses had been built thereon, since said land had been sold" by demandant's husband to said Gullatt. Evidence was also offered by Snodgrass, and not objected to, that Mrs. Clark, the demandant, joined with her husband, said Isaac Clark, in his deed conveying said lands to Gullatt; and that improvements on said lands had been made by Snodgrass, since his purchase, and that such improvements had greatly enhanced the value of the lands, but no price was fixed as the value of the improvements. It is averred in the bill of exceptions, that it contains "all the evidence." Nothing is said therein of any evidence offered by the demandant, Mrs. Clark.

After the judge had heard all the evidence, Snodgrass "objected to an assignment of dower to the plaintiff, by metes and bounds, in the said lands," and to the judge of probate "taking jurisdiction thereof." These objections the judge overruled, and adjudged the demandant to be entitled to dower in the lands mentioned in her petition, and ordered the same to be allotted by metes and bounds, in the manner prescribed by law. To all of which Snodgrass excepted, and reserved the same in his bill of exceptions. And he now brings the case here to revise the action of the judge of probate in the court below.

In this State, "when the dower interest can be assigned by metes and bounds," any person, entitled to make the application for the assignment of dower, may petition the judge of probate of the proper county "to cause the assignment to be made;" and such petition "must contain"—

"1. The facts on which the widow's claim to dower rests, with a description of the land in which dower is claimed, by its designation at the land office, when that can be done; if not, by metes and bounds, or such other description thereof as will identify it.

“2. When the land in which dower is claimed has been aliened in the life of the husband, the name of the alienee and his residence, if known; if he is not in possession of the land, the name of the person in possession.

“3. The names of the widow and heirs-at-law, stating which are minors and married women, and the name of the personal representative of the husband, stating the county in which each reside, if residents in this State, and which of them, if any, are non-residents.”—Rev. Code, §§ 1631, 1632; *Forrester v. Forrester*, 38 Ala. 119; *Smith v. Johnson*, 37 Ala. 633.

But “when the land of which dower is demanded has been aliened by the husband, and from improvements made by the alienee, or from any other cause, an assignment of dower by metes and bounds would be unjust, the judge of probate must decline jurisdiction, and application must be made to the court of chancery.”—Revised Code, § 1640; *Brooks v. Woods*, 40 Ala. 538. The present controversy demands a construction of the sections of the statute above quoted.

When the dower interest can be assigned by metes and bounds, then the judge of probate has jurisdiction of the proceedings, and may cause the assignment of dower to be made, whether the lands have been aliened or not, unless by reason of improvements made by the alienee, or from any other cause, such assignment would be unjust. The judge of probate can only assign dower by metes and bounds. But when there has been an alienation by the husband and improvements by the alienee, and “an assignment by metes and bounds would be unjust,” the application must be made to the court of chancery. In this latter case, a new rule of assignment takes the place of an assignment by metes and bounds. Compensation is given to the widow in lieu of a partition and allotment of the land.—Revised Code, § 1642; *Thresher et al. v. Pinkard's Heirs et al.*, 23 Ala. 616. But alienation by the husband, and improvements by the alienee, do not oust the jurisdiction of the judge of probate, unless “an assignment by metes and bounds would be unjust.” All these conditions



must concur before the judge of probate is compelled to decline jurisdiction. If the assignment by metes and bounds, after improvements by the alienee, can be made in such a manner that it is not "unjust," then it may be made by order of the judge of probate. It is the injustice of an assignment by metes and bounds, coupled with the facts of alienation and improvement by the alienee, which induces a necessity of a resort to chancery.

Dower is an estate for the life of the widow—1st, in all lands of which another was seized in fee during the marriage; 2d, in all lands of which another was seized in fee for the husband's use; 3d, in all lands to which the husband at the time of his death had a perfect equity, having paid all the purchase-money thereof.

And the quantity of this estate is described by the statute, as follows: 1. When the husband dies, leaving no lineal descendants, and his estate is not insolvent, his widow is entitled to be endowed of one-half of his lands; 2. But if his estate is insolvent, then she is entitled to one-third part of his lands; 3. And when there are lineal descendants, then to one-third part thereof, whether the estate of the husband be insolvent or not.—Rev. Code, §§ 1625, 1626.

It does not appear, from these sections of the statute, that mere alienation by the husband and improvements by the alienee necessarily oust the jurisdiction of the judge of probate. To effect this, it must be shown that the assignment by metes and bounds would be unjust. This may or may not follow, from the fact that a small portion of the lands has been cleared and put in cultivation; but this can not be presumed by the court, without the aid of facts to support the presumption. If, however, the facts show that the improvements, made by the alienee, so materially alter the value of the land as to make the widow's portion more valuable than it would have been without the improvements, then the allotment by metes and bounds would give her more than she is entitled to, and this would be unjust; and then the judge of probate should decline the jurisdiction. Then a new rule takes place.—Rev. Code, § 1641. If this were all the objection in this case, we would not feel inclined to reverse the judgment of the court below, because

it does not clearly appear that the improvements so enhance the value of the land as to make the assignment by metes and bounds unjust.

But the judgment must be reversed for another reason. Two of the witnesses of Snodgrass, the contestant below, were absent at the hearing of the cause. They were Gullatt and Jones. This is shown by the affidavit of the contestant, which shows also the testimony of these absent witnesses. This is made a part of the bill of exceptions. The demandant, "for the purpose of a trial," "admitted that the witnesses therein named would, if present, prove the facts therein stated."—Rule 16, Pr. in Cr. Ct., Revised Code, p. 821. In this affidavit it is stated that the contestant "will be able to prove by Gullatt, that he, Gullatt, on the — day of —, 18—, purchased for valuable consideration from the plaintiff's husband, Isaac Clark, the land in which petitioner claims dower; that said Isaac Clark conveyed, in pursuance of said purchase, by proper deeds, the said lands to said Gullatt, in which said conveyance the petitioner, Jemina Clark, joined with her said husband." This statement must be taken as the testimony of Gullatt, and it is entitled to the same credit that the evidence of Gullatt would have been entitled to, had he deposed in person, in open court. It is, to all intents and purposes, on the trial, Gullatt's testimony, and unless it is impeached or disproved, it must govern the judgment of the court to the same degree. The judge is not authorized to reject it in making up his decree, if it is not contradicted by other evidence delivered, or admitted, on the trial, or otherwise shown to be untruthful.

But this statement of facts was admitted, not only as the evidence of Gullatt, but also as "facts proved" on the trial. This appears from the language of the bill of exceptions. Its force can not, therefore, be evaded, unless it is in some way impeached or discredited. The bill of exceptions contains "all the evidence." It is not shown that this statement of facts is, any where, questioned or disputed. A thing proved is a thing beyond controversy. It stands as a fact admitted.—1 Greenl. § 1; Hamlt. Logic, p. 361, *et seq.* If this statement of facts is to be taken as

true—and there is nothing in the bill of exceptions, or in any part of the proceedings below, which, as evidence, in any wise invalidates its veracity—it shows that the demandant was barred of her dower in the lands named in her petition, by joining in the deeds made by her husband, when he sold and conveyed the lands named to Gullatt, about twenty-eight years before the trial, in the court below; that is, in the year 1840. This was the effect given by law to her act at that date.—Clay's Dig. p. 174, § 10.

The practice of the court of probate and the court for the assignment of dower very much assimilate to the practice of the court of chancery, in like cases. It is, therefore, to a very great extent, governed by the same rules, both as to procedure and liberality of amendments.—Rev. Code, § 3356; *King v. Collins*, 21 Ala. 363; 3 Bac. Abr.; Bouv. 214; 40 Ala. 538.

The bill of exceptions, when it contains all the evidence, controls the recitals in the judgment.—*Davidson et al. v. Street et al.*, 34 Ala. 125; *Vincent v. Rogers*, 30 Ala. 471. The bill of exceptions shows facts which go to bar the right of dower. The decree assigning dower was contrary to the evidence, and must be reversed. The decree is therefore reversed, and the cause remanded for further proceedings in the court below.

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### CARSWELL vs. SPENCER.

[FINAL SETTLEMENT OF GUARDIAN—JURISDICTION OF PROBATE COURT.]

1. *Probate court; what application has not jurisdiction of.*—If a ward die, and his guardian is appointed administrator of his estate, the probate court, in such a case, has no jurisdiction, at the instance of a distributee, to entertain an application to call the guardian to a settlement of his guardianship, for the reason that any decree rendered in such a case, must necessarily be rendered in favor of the guardian, in his character of administrator; and as no judgment or decree can be rendered for,



and against the same party, such a judgment or decree, if rendered, is a nullity.

2. *Same; remedy in such case.*—In such a case the remedy is in chancery, where the distributee, on a proper bill filed for that purpose, can make the guardian a party in both characters—as guardian and as administrator—and pray for a final settlement and distribution of the estate, by the party as administrator and as guardian on a final accounting and settlement of his guardianship.
3. *Final decree; what has none of properties of, and will not support an appeal.*—If such a proceeding be had, in the probate court, after the death of the ward and the appointment of the guardian as administrator, an entry by the court that on auditing the guardian's account, a certain sum is found to be in his hands as guardian, which sum as administrator of the ward's estate he is directed to retain until the further order of the court, has none of the properties of a final judgment or decree, and no appeal can be taken on it, and if an appeal be so taken, in such a case, it will be dismissed.

### APPEAL from Probate Court of Greene.

Tried before Hon. WILLIAM MILLER.

On the 5th September, 1864, the appellee, Spencer, was appointed guardian of W. F. Rogers, a minor, who died intestate in October, 1866. On December 3d, 1866, said Spencer was appointed administrator of the estate of his deceased ward. On the 14th of January, 1869, said Spencer was cited by the probate court, at the instance of Mrs. Caroline Carswell, who claimed to be the sole heir-at-law and distributee of said deceased minor, Rogers, to make a final settlement of his accounts as guardian.

On the day set for the hearing of the cause, said Caroline A. Carswell appeared in court, was made a party to the settlement, and made various motions to charge the appellee, as guardian, with various sums, and objected to the allowance of various credits, which, in the view of the case taken by the court, it is unnecessary to notice further.

The court rendered the following judgment: \*

\* \* \* \* \* "The court proceeded to hear and audit the account of the guardian, when it appeared that the amount received by the guardian, was \$1,631 53, and his disbursements, supported by good and legal vouchers, including all the costs of this proceeding, and commissions allowed, amounted to the

sum of \$1,279 91, and leaving a balance due the ward, in the hands of the guardian, on final settlement, the sum of \$351 42, which the guardian, being the administrator of the estate of Wm. F. Rogers, deceased, is authorized and required to retain in his hands subject to the further order of this court."

The appellant excepted to the various rulings of the court, on the settlement, took an appeal to this court, and here makes eighteen assignments of error; none of which need be noticed further.

The appellee moves to dismiss the appeal—

1. Because the decree below was against J. M. Spencer, as guardian, and in favor of the same J. M. Spencer as administrator, of the same estate, Mrs. Carswell being really no party to the record, and not authorized to take an appeal.

2. Because there is no such final decree as will sustain an appeal.

3. Because the probate court had no jurisdiction of the cause.

4. Because the appeal is not shown by the record, and there is no sufficient security for costs.

R. CRAWFORD, for appellant.

CHILTON & THORINGTON, *contra*.

PECK, C. J.—The appellee moves to dismiss this appeal—1st, on the ground that, under the peculiar circumstances of this case, the probate court had no jurisdiction to entertain these proceedings, and that the remedy is in the chancery, and not in the probate court; 2nd, that there is no final decree, upon which an appeal can be taken; and, 3d, that the appeal is not shown by the record, and that there is no sufficient security for the costs.

On the first ground, the appellee refers to, and relies upon the case of *Hays, Executor, v. Cockrell, Administrator*, 41 Ala. 75. Although that case, in all its features, is not like this, the principle there settled, we think, is decisive of this motion, and shows that the appeal must be dismissed.

In that case, *Hays* was the administrator, *de bonis non*,

of the estate of one Hairston, deceased, and, also, the executor of Mrs. Hairston, the widow, who, at her death, was the administratrix of her deceased husband, the said Hairston. This court says in that case, that the probate court had no jurisdiction to settle with such executor, the administration of his said testator, as the administratrix of her said husband's estate. The court held, that the party making the settlement, being the representative of both estates, no decree could be rendered *in his favor* as the representative of one estate, *against himself*, as the representative of the other. That is, substantially, the predicament of this case. The appellee is the administrator of his deceased ward's (Wm. F. Rogers') estate, and, at the instance of the appellant, who claims to be the sole heir-at-law and distributee of the said ward's estate, he is sought to be called to an account and settlement of his guardianship, and to be charged with the estate of his late ward, that came to his hands, as guardian, &c. It is clear, therefore, on such a proceeding, if any decree is rendered against him, as guardian, it must be rendered for him, as administrator. Such a decree would be an absurdity—a mere nullity.—See the case of *Hays, Ex'r, &c., v. Cockrell, Adm'r, supra*, p. 87.

No decree, in such a case, could be, and, in this case, none is rendered for the said party claiming to be sole heir-at-law and distributee of the said deceased ward, nor is any decree rendered against her.

As in contracts, so in judgments and decrees, unless in proceedings *in rem*, there must be, of necessity, two parties—one party for whom, and another party against whom, the judgment or decree is rendered, and a judgment or decree that is rendered for, and against the same party, as we have seen, is a mere nullity. In this case, as I have said, there is no judgment or decree either for, or against, the appellant; if, therefore, there is any judgment or decree in this case, it must be for the said appellee, as administrator, and against him, as guardian; and as the probate court had no authority—no jurisdiction to render such a judgment or decree, the appeal must be dismissed. It is insisted by appellant, that section 9 of article VI. of the



present constitution, gives the probate courts a general jurisdiction in "orphans' business," a jurisdiction, it is said, these courts did not have before the adoption of the constitution—a jurisdiction that, now, it is contended, enables them to exercise all the powers of a court of chancery, in orphans' business. It is unnecessary for us to decide, in this case, what powers the general assembly may confer on these courts, under this section. It is enough, here, to say, that there has been, as yet, no legislation on this subject, and until this is done, their jurisdiction and powers will remain as they were before the constitution was adopted.

2. Is there any final judgment or decree in the record to sustain this appeal? The transcript appears on this subject, in substance, as follows: "The court proceeded to hear and audit the account of the guardian, when it appeared that the amount received by the guardian was \$1,631 53, and his disbursements supported by good and legal vouchers, including all costs of this proceeding, and commissions allowed, amounted to the sum of \$1,279 91, and leaving a balance due the ward, in the hands of the guardian, on final settlement, the sum of three hundred and fifty-one dollars and forty-two cents, which the guardian, being the administrator of the estate of Wm. F. Rogers, deceased, is authorized and required to retain in his hands, subject to the further order of this court."

This entry, certainly, has none of the properties of a final judgment or decree. It merely finds, that a certain sum was in appellee's hands, as guardian, and which, as administrator, he is directed to retain in his hands, subject to the further order of the court.

It is unnecessary to consider the third ground assigned, to dismiss this appeal—the two we have disposed of, are sufficient for that purpose.

We do not decide that the appellant, as sole distributee of the estate of the deceased ward, Wm. F. Rogers, can not call the appellee, as administrator, &c., as aforesaid, to a final settlement and distribution of the estate of said ward, in the probate court, or, whether, on such settlement, the administrator, as such administrator, can be charged

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Roach, Adm'r, v. Gunter et al.

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with more than the assets of said estate, that have come to his possession in that character. On these questions, we leave her to take the advice of her counsel. But we decide, that under the peculiar circumstances of this case, the probate court has no jurisdiction of an application to require the said appellee, as the late guardian of said deceased ward, to come to a final settlement of his said ward's estate, for the reasons above stated, to-wit, that any decree, that could be rendered on such settlement, must be rendered against him, as guardian, and in his favor, as administrator, of said ward's estate; but that the remedy, in such a case, is in chancery, where, on a proper bill filed, the said appellee could be made a party defendant, in both characters, both as late guardian, and present administrator, of the ward's estate, and on such a bill the said court could not only require him to come to a final settlement and distribution of said estate, but also compel him to settle up his guardianship, and hold him accountable for any loss to the estate, by reason of any misconduct or neglect in the discharge of his duties as guardian, or violation of his trust as such guardian.

We also decide, that there is no final decree in this record, upon which the appellant can sue out an appeal to this court.

Let the appeal be dismissed, at the costs of the appellant.

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### ROACH, ADM'R, vs. GUNTER ET AL.

[ACTION ON PROMISSORY NOTES BY PAYEE AGAINST MAKERS.]

1. *Ordinance No. 38 of convention of 1867, section one of; unconstitutionality of.*—Section one, of ordinance 38, adopted by the State convention of 1867, which ordains that "all contracts for the sale of lands which are incomplete by reason of the purchase-money being unpaid, or the title deeds and conveyances being unexecuted, and which sale took place between the 11th day of January, 1861, and the 9th day of May,

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1865, unless paid for, or contracted to be paid for, in the legal currency of the United States or property other than slaves, are hereby declared null and void at the option of the parties, or either of them," is unconstitutional, because it impairs the obligation of contracts.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

This was an action by the appellant, as administrator, &c., against the appellees, founded on fifteen separate promissory notes made by them on the 12th day of December, 1864, due twelve months after date, and "payable in the common currency of the country," at maturity, for the purchase of lands sold them in 1864 by the plaintiff, as administrator of William Roach, deceased.

On the trial of the cause, the defendants pleaded in short by consent, seven pleas, only the 6th and 7th of which need be here noticed. These pleas are as follows :

"6. That the contract for the sale of the land for which the notes were given, was made between the 11th day of January, 1861, and the 9th of May, 1865, and the purchase-money has never been paid nor the deeds or conveyances executed, and the contract is void under the first section of the ordinance of the convention of 1867, adopted December 6th, 1867, No. 38, and defendants have signified and still signify their option to hold said contract void.

"7. The notes were given for land purchased between the 11th of January, 1861, and the 9th of May, 1865, no conveyance to which has been made, and the notes are void."

The plaintiff demurred to these pleas, and, among other reasons, assigned—1st, "that said section one of ordinance No. 38 is unconstitutional and void, because it impairs the obligation of contracts; 2d, that section one of ordinance No. 38 does not apply to sales made by an administrator under an order of the probate court, &c.; 3d, that said 6th and 7th pleas fail to state that the land sold, &c., was not paid for, or contracted to be paid for, in legal currency of the United States, or property other than slaves."

The court overruled the demurrer, and the plaintiff was



forced thereby to take a non-suit. Overruling the demurrer is now assigned as error.

JAMES L. PUGH, and W. C. OATES, for appellant.

F. M. WOOD, for appellee.

NOTE BY REPORTER.—This decision was rendered at the June term, 1869, and should have appeared in 43d Alabama Reports.

B. F. SAFFOLD, J.—The section of the ordinance referred to, declares that “all contracts for the sale of land which are incomplete by reason of the purchase-money being unpaid, or the title deeds and conveyances being unexecuted, and which sale took place between the 11th day of January, 1861, and the 9th day of May, 1865, unless paid for, or contracted to be paid for, in the legal currency of the United States or property other than slaves, are hereby declared null and void at the option of the parties, or either of them; *provided*, that subsequent purchasers shall not be affected by the provisions of this section.”

The notes were all made on the 12th of December, 1864, and were payable twelve months after date, in the common currency of the country at the time of their maturity. The pleas demurred to are bad, because they do not aver that payment was not to be made in the legal currency of the United States, nor in property other than slaves. If they had contained the proper averment, as the common currency of the country at the time of the maturity of the notes was the legal currency of the United States, there may be merit in the argument that the contract is not one to which the ordinance is applicable. It is not necessary to determine this. The judgment must be reversed for the defect of the pleas. As on another trial the constitutionality of the section of the ordinance relied on for the defense will be put in issue, the interests of the parties, and of the people generally, require an adjudication of that question.

The prohibition to a State to pass any law impairing the obligation of contracts, applies to both those which are

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executory and those which are executed. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, and a law discharging the vendors of property from the obligation of executing their contracts by conveyances, are alike repugnant to the constitution.—*Fletcher v. Peck*, 2 Peters' Cond. Rep. 321, 322. The same may be said of a law which allowed the vendee of property, or the grantee of a conveyance, after having received the consideration of his promise to pay, to repudiate his obligation, and to rescind the contract without the excuse of fraud, default, or mistake.

This ordinance absolves a vendor of land from the performance of his undertaking, and allows him to stand seised of his estate, if he has not made a conveyance, though he may have been fully paid for it according to the agreement. It grants to him the same privilege and exemption if he has executed the conveyance, and has received nine-tenths of the consideration agreed on at the date of the contract. It relieves a vendee who has enjoyed the benefit of his purchase for several years from his obligation to pay for it, and permits him to return it to the former owner, no matter how much injured or depreciated in value it may have become in his hands.

The right of the citizens of Alabama to contract with each other, was as complete during the war as it was before, or is now. They were, at that time, constrained, from necessity, to use the Confederate currency as a medium of exchange. Where parties acting for themselves and under no legal disability, voluntarily made contracts which were to be satisfied on one side in that currency, and which were so satisfied, equity and law both unite in the conclusion that there can be no hardship or impropriety in the execution of their expressed will.

Property in slaves is not now recognized. It is unnecessary to determine the precise time when it ceased. It is sufficient to say, that the period embraced by this ordinance includes a time when such property was recognized, and regarded both by the laws of the State and of the Union, as the valid consideration of a contract.

We decide that section 1 of ordinance No. 38, concerning the value of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves, adopted by the State convention of 1867, impairs the obligation of contracts, and is in violation of the constitution of the United States, and therefore null and void.

The judgment is reversed, and the cause remanded.

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RHODES *vs.* WALKER, ADM'R.

[ACTION ON PROMISSORY NOTE—JUDGMENT BY DEFAULT.]

1. *Administrator; what sufficient averment of representative capacity of.*—An averment in a complaint that plaintiff, administrator of J. B., claims of the defendant the amount due on a note payable to his intestate, sufficiently shows that he sues in his representative capacity.
2. *Plaintiff, character of; recital in judgment entry refers to.*—The recital, in a judgment entry, that the plaintiff recover, &c., relates to the character in which he sues, as set out in the complaint.
3. *Record; what not part of.*—In a judgment by default, the note which was the cause of action is not a part of the record on appeal.

APPEAL from Circuit Court of Limestone.

Tried before the Hon. W. B. WOOD.

Judgment by default on promissory note. The complaint is as follows:

“Elijah Walker, administrator of the estate of J. N. Baker, deceased, plaintiff,

*vs.*

Hamilton Rhodes, defendant.

“The plaintiff, administrator of the estate of J. N. Baker, deceased, claims of the defendant one hundred and seventy-five dollars, due by promissory note made by him on the 13th day of September, 1862, and payable one day after date to plaintiff's intestate, with interest thereon.”

The judgment entry is as follows:



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"Elijah Walker, Adm'r,

vs.

Hamilton Rhodes.

} Came the plaintiff by attorney, and the defendant being called to come into court

and defend his cause, came not, but made default. It is therefore considered by the court, that the plaintiff recover of the defendant the sum of one hundred and seventy-five dollars, being the amount in the plaintiff's complaint mentioned, also the sum of seventy-seven dollars damages in the way of interest on said debt, also the costs in this behalf expended, for which let execution issue.

In the transcript sent up, there is a copy of the promissory note sued on—but in what manner it became a part of the proceedings in the court below, is nowhere stated.

The defendant appeals to this court and here assigns for error—

1. That the court erred in rendering judgment for plaintiff.
2. That the court erred in rendering judgment in favor of the plaintiff below individually, instead of rendering it in his favor as administrator of his intestate Baker.
3. That the court erred in rendering a final judgment, upon the paper called a promissory note, without the intervention of a jury.

WADE KEYES, for appellant.

E. A. O'NEAL, for appellee.

[No briefs on file.]

B. F. SAFFOLD, J.—The complaint sufficiently shows the character in which the plaintiff sues. The judgment must follow the complaint, and the denomination of the plaintiff in it, must be referred to the more particular description of the capacity in which he sues, as set forth in his complaint.

The error assigned, that judgment was rendered without the intervention of a jury, is not sustained by the record. In a judgment by default, the note which was the cause of action, is not a part of the record on appeal. The writing described in the complaint ascertains the plaintiff's demand.

The judgment is affirmed.

WARD, ADM'R, *vs.* HUDSPETH.

[ACTION ON PROMISSORY NOTE GIVEN FOR PURCHASE OF SLAVES.]

1. *Plea ; what demurrable.*—A plea which states that the note sued on was given in consideration of slaves sold by the plaintiff to the defendant in 1860, is bad on demurrer.
2. *Probate court, order of sale by ; when can not be collaterally attacked.*—Where a probate court grants an order for the sale of personal property of an estate for distribution, if such court obtains jurisdiction by a proper application, and errors afterwards intervene in the proceedings, the order of sale can not be collaterally impeached for such errors, but will be held valid until reversed, &c., on a direct proceeding for that purpose ; and until such order is so reversed, a charge by a court that a sale made under such an order is void, is erroneous.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The facts are sufficiently stated in the opinion.

MARTIN &amp; SAYRE, and W. C. OATES, for appellant.

J. L. PUGH, *contra*.

PECK, C. J.—The appellant, as the administrator of the estate of James Ward, deceased, commenced this suit against the appellees, said Hudspeth and Edmund J. Ward, Manson D. Hart, and Levi Parish, in the circuit court of Henry county, at the spring term thereof, in the year 1866.

The death of said Edmund J. Ward was suggested, and as to him, the suit abated.

The defendants filed three pleas—1st, the general issue ; 2d, that the note sued on was given without consideration ; 3d, that the note, the foundation of the action, was given solely for the price bidden for slaves, sold at public outcry, by plaintiff, as administrator of James Ward, deceased, under an order of sale, for distribution among the heirs-at-law of said deceased, granted by the

judge of probate of Henry county, Ala., on the third Monday in October, 1860, on a petition by said administrator, filed on the fourth day of September, 1860.

The plea then sets out all the proceedings in said probate court, including the order of sale—the sale, return of the sale, and the confirmation thereof, &c., and concludes by stating, that said order of sale, and the sale made under it, are wholly void. The minute entry states that issue was taken on these pleas, a trial by a jury had, and verdict and judgment for the defendants.

There is a bill of exceptions in the record, that states, that the plaintiff demurred to the said third plea, which was overruled by the court. It also sets out the evidence on both sides, which, on the part of the plaintiff, consists of the note, described in the complaint, and on the part of the defendants, a transcript of the record and proceedings, in the probate court, which consists of the plaintiff's petition in that court, praying for an order to sell the personal property of said estate, consisting of some fifty slaves, to make distribution among the widow and heirs of said deceased, embracing all the proceedings, to, and including the report of the sale, and the approval of the sale, by the said court, which, it is stated, was all the evidence in the case; upon which the court charged the jury, that if they believed the evidence, they must find for the defendant—that said decree of sale was void, and that plaintiff could not recover.

I have examined these proceedings with some care, and confess, I am unable to discover any substantial error or errors in them. No particular irregularity or error is pointed out or designated, either in the plea, or the charge of the court, or in any other way. We are left to hunt for them, without any guide or finger boards. The petition seems to be sufficient to give the court jurisdiction, and errors or irregularities that afterwards intervene, if any, can not be reached by objection in a collateral proceeding, but only by a direct proceeding on appeal, for that purpose. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510, and cases cited, &c. In this case, the said Edmund J. Ward, as to whom the suit abated by his death, and who was the principal in the



note sued on, was a distributee of said estate, lived in the county where the proceedings in the probate court were had, had personal notice of the application of the administrator, and, as far as the record shows, made no objection to the proceedings, or the decree for the sale of the property, but, on the contrary, was at the sale, and bought slaves to the amount of the note sued on, ten thousand nine hundred and fifty dollars, and as such distributee, has a credit on said note, for the sum of six thousand five hundred dollars.

For these reasons, we think the circuit court was wrong in overruling the demurrer to the third plea, and in the charge given to the jury.

Such charges are rarely proper, and should never be given, but in very clear cases; they are too apt to make the court both judge and jury; in other words, to invade the proper province of the jury.

I presume the demurrer to the third plea was overruled upon the idea, that the third section of ordinance No. 38 of 1867, that declares, there is a failure of consideration on all notes given on the sale of slaves; and, most probably, it was on this idea, that the court held that an order of the probate court, for the sale of that kind of property, was void. However this may be, we decide the court below was mistaken, and as that section has been since declared, by this court, unconstitutional, we hold that the charge of the court was wrong; and that there is error in overruling the demurrer to the said third plea. Let the judgment of the circuit court be reversed, and the cause be remanded, at the costs of the appellees.

FULMORE ET AL. *vs.* BRADY.

[BILL IN EQUITY—PLEA TO JURISDICTION.]

1. *Section 1, article 8, of constitution of Alabama; effect of, on venue of cause in chancery.*—Section 8 of article 6 of the constitution of this State does not confine the venue of a chancery cause to the county of the defendant's residence, or to that in which the property, the subject-matter of controversy, is situated. (PETERS, J., *dissenting.*)

APPEAL from the Chancery Court of Barbour and Henry.  
Heard before Hon. B. B. McCRAW.

The appellee filed her bill against the appellants in the 9th chancery district, composed of the counties of Barbour and Henry, of the eastern chancery division of the State. The appellants pleaded to the jurisdiction of the court, that "the cause was depending in a chancery court held at Clayton, in Barbour county; that they were citizens of Henry county; that under the constitution, article 6, section 8, a chancery court held in Henry county would alone have jurisdiction in the cause; that the lands in controversy are situated in said county of Henry; that the act of the general assembly attaching said county of Henry to, and constituting it a part of, the 9th district of the eastern division, was unconstitutional and void," &c.

A demurrer to this plea was sustained by the court, and this action is now assigned for error.

W. C. OATES, for appellants.—1. The error of the court below, in sustaining the demurrer to the plea of appellants, is manifest.—Section 8 of article 6 of the Constitution of Alabama; see, also, Official Journal of the Constitutional Convention of Alabama, pp. 160, 161.

There is no conflict between the 7th and 8th sections of the constitution. The former provides that the legislature, or general assembly, shall divide the State into convenient chancery divisions, and the divisions into districts. The

latter provides, that "*a chancery court shall be held in each county, at a place therein to be fixed by law.*" Construe these provisions of the two sections so that both may stand and have something upon which to operate, the latter must be held to limit and qualify the word "district," as used in the former section, to be synonymous with the word "county," as used in the latter.

The 8th section is mandatory, and the act of the general assembly making the county of Henry a part of the 9th chancery district, and requiring the court to be held at Clayton, in the county of Barbour, for the trial of causes where the defendants reside in Henry county, and the subject-matter to be adjudged is also situate there, is unconstitutional and void.—Cooley's Constitutional Limitations, p. 74, *et seq.*

If the general assembly may disregard a mandatory clause of the constitution, and deprive the people of their rights guaranteed by it, then they who are the servants and representatives of the people, and who derive their authority from the people, are greater than the people in point of power, or, in other words, the creature is greater than the creator, which is an absurdity.

On the principle of contemporaneous and legislative construction, I need but refer the court to the action of the legislature in creating two new chancery divisions, to show that they regarded the 8th section as settling the question, that the chancery court should be held in each county; for otherwise, there was no necessity for such action on the part of that body.

A chancery court was in existence, and had been, at Abbeville, in Henry county, for twenty-five years before the passage of the act abolishing that court and attaching that county to the 9th district as aforesaid.—Revised Code, §§ 696, 708.

The adopting act of the general assembly, (Pamph. Acts 1868, p. 7,) approved July 29, 1868, found the above sections of the Revised Code incorporated into that body of statutes, and there was nothing in it in conflict with the constitution of the United States, and nothing in conflict with the State constitution, except that Dale county was



included with Henry in comprising the 6th district of the southern chancery division, and the only effect of the new constitutional provision, and the adopting act, was to strike off from said district the county of Dale, leaving the court at Abbeville for the county of Henry still intact and lawfully established by the law of the Code. If thus established, it is manifest that the act of the general assembly, attaching Henry to the county of Barbour and constituting them the 9th district, as aforesaid, is unconstitutional and void, and hence, the plea to the jurisdiction of the court should have been sustained.

The proviso to the 5th section of the constitution confers upon the several circuit courts of the State chancery jurisdiction in certain cases, but it no where prescribes or points out the machinery by which it can execute itself, and in the absence of an act of the legislature providing the means for carrying it into effect, it no more fills the requisition of section 8, than if it were entirely omitted from the constitution. Where will the clerk of the circuit court, or a register appointed by the circuit judge, acting in chancery causes, find any statute to authorize or direct his action? That said proviso has no operation or effect, see *Groves v. Slaughter*, 15 Peters.

The words, "a chancery court," &c., in said section, have a well defined technical meaning, which should receive the same signification attached to those words by all courts under the separate chancery court system in existence at the time of, and anterior to, the adoption of the present constitution.—*Ex parte Banks*, 28 Ala. 28.

JOHN GILL SHORTER, *contra*.

B. F. SAFFOLD, J.—The constitution (article 6, § 8,) provides, that a chancery court shall be held in each county at a place therein to be fixed by law. No action has been taken by the legislature in compliance with this section. In 1868, the State was divided into chancery divisions and districts, agreeably to the 7th section of article 6. By that act, Barbour and Henry counties were made one district, with the place of holding the court at Clayton, in Barbour

county.—Acts 1868, p. 47. It is evident that no court can be held in a county, unless some place where it shall be held is appointed by law, and also, that there is no power in the State which can compel the legislature to fix a place.

Under these circumstances, has the defendant such a right of venue, given by the constitution, that he can not be sued out of the county of his residence, or of the subject-matter of the suit?

Two terms of the circuit court are required to be held in each county annually, (Const. art. 6, § 6,) and the time and place are appointed. Yet the practice of suing parties out of the county of their residence by means of branch writs is frequent, and directed by statute, and the right to do so has heretofore never been questioned.

By the 8th section of the declaration of rights, a person accused of crime can not be tried, against his consent, elsewhere than in the district or county in which it is committed. Yet, the jurisdiction of offenses committed on the boundary of two or more counties, or within a quarter of a mile thereof, is in either county by statute; a district being thus formed greater than the county.—Rev. Code, § 3945.

The construction contended for by the appellant would forbid a change of venue of civil causes in any of the courts, except by consent of the parties, and frequently defeat the right to an impartial trial. In addition to this, the plaintiff is as much entitled as the defendant to claim that the venue shall be in the county of his residence.

We decide, that article 6, section 8, of the constitution of the State does not confine the venue of a chancery cause to the county of the defendant's residence, or in which is situated the property which is the subject of the suit.

The judgment is affirmed.

PECK, C. J., concurred.

PETERS, J., (*dissenting.*)—With every sentiment of respect for the majority of the court, I do not feel able consistently to agree with the reasoning or conclusion of the opinion just delivered.

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Fulmore et al. v. Brady.

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The chancery system of this State, under the present constitution, makes each county in the State a chancery district, in which a court is required to be held. That portion of the constitution which authorizes the establishment of the chancery courts, is in the following words :

"Sec. 5. *Provided, however,* that the circuit court shall have equity jurisdiction concurrent with the courts of chancery, in all cases for divorce, and cases in which the value of the matter in controversy does not exceed the sum of five thousand dollars.

"Sec. 7. The general assembly shall have power to establish a court or courts of chancery with original and appellate jurisdiction. The State shall be divided by the general assembly into convenient chancery divisions, and the divisions into districts; and for each division there shall be a chancellor, who shall, after his election or appointment, reside in the division for which he shall have been elected or appointed.

"Sec. 8. A chancery court shall be held in each county, at a place therein to be fixed by law, and the chancellors may hold courts for each other, when they deem it expedient."—Const. Ala. 1867, art. 6, §§ 5, 7, 8.

The 8th section of the constitution above quoted, is a *proviso* which limits the power of the general assembly, in establishing chancery districts, to each county in every division throughout the State. It is a constitutional designation of the chancery districts of the State, which the general assembly can not alter or depart from. And it is the duty of this tribunal to denounce any attempt at such departure as an effort to infringe the fundamental law, and to declare it void. No two or more counties can be united by law in one chancery district, without what seems to me a disregard of this positive constitutional provision, which is expressed in language not capable of misconstruction. The language of the constitution is affirmative and imperative, and there can be no reasonable doubt about its meaning. In such a case, this court has no choice but to declare the law void, which is not in conformity with the constitution. To do otherwise, would not be to support the constitution, but to fritter it away, and in the end overturn it.



Speaking with the highest consideration of a co-ordinate branch of the government, it seems to me beyond all question, if the legislature can combine two or more counties into one chancery district, they may by the same authority combine all the counties in a division into one chancery district; for there is no limit to the power, if it is not controlled by section 8 above quoted. And if this section controls the action of the general assembly, as it most certainly does, in the establishment of chancery districts, it limits and confines their creation to one district at least, in each county in the State. A different construction would make this section of the constitution wholly nugatory.

The true effect of the constitution is to make each county in the State a chancery district. The legislature must recognize this number at least, and may make as many more as it may think fit, and fix the places, *in the counties*, for the courts to be held. A law which transcends these bounds is at war with the constitution, and is void for that reason.—*Marbury v. Madison*, 1 Cranch, 137, 176, 179. It follows from this, that so much of the act of the general assembly, entitled "An act to amend sections 4, 5, 14, and 15 of an act in relation to the chancery courts in Alabama," approved the 6th day of October, 1868, as combines the counties of Barbour and Henry into one chancery district, is unconstitutional and void.—Pamph. Acts 1868, p. 209, § 1, No. 7.

The present law of the State requires that the bill shall be filed in the chancery district—that is, the county—in which the defendants or a material defendant resides.—Revised Code, § 3326.

In this case the defendant was sued out of his county—that is, out of his chancery district; that is, out of the district in which he resides. This he can set up in his defense by way of plea in his answer.—Rev. Code, § 3349. This plea shows that the court has no jurisdiction over the defendant according to law. The bill then ought to have been abated.

I therefore think that the true construction of the constitution requires a reversal of the decree of the court below, and the dismissal of the bill.

HATCHETT ET AL. *vs.* MILNER ET AL.

[APPEAL FROM ORDER OF CITY COURT, OVERRULING MOTION TO SET ASIDE AN ORDER, MADE AT A PREVIOUS TERM, GRANTING A NEW TRIAL ON A JUDGMENT IN SAID COURT, UNDER ORDINANCE NO. 38, OF CONVENTION OF 1867.]

1. *Appeal; what not such a final judgment as will support.*—An order of the city court of Montgomery, overruling a motion to set aside an order of said court, made at a previous term thereof, granting a new trial on a judgment of that court under ordinance No. 39, of the covention of 1867, is not a final judgment, upon which an appeal can be taken. An appeal on such an order will be dismissed, on motion of the appellee.
2. *Mandamus; remedy to avoid such order.*—The remedy to avoid such an order, is an application to this court for a *mandamus* to require the court, making such an order, to vacate and set aside the same.

APPEAL from City Court of Montgomery.

Tried before Hon. J. D. CUNNINGHAM.

The facts are sufficiently stated in the opinion. The appellees submit a motion to dismiss the appeal, because there has been no such final judgment in the court below, as will authorize an appeal.

ELMORE & GUNTER, for appellants.

RICE, SEMPLE & GOLDTHWAITE, *contra*.

PECK, C. J.—In this case, the record shows that Howell Rose, now deceased, as plaintiff in the court below, the city court of Montgomery, at the February term thereof, in the year 1866, recovered a judgment by default, against the appellees, for the sum of twenty-three hundred and ninety-two dollars, upon a promissory note, without date, but payable on the first day of January, 1862, for the sum of eighteen hundred dollars, to said Rose or bearer, for the hire of certain negro slaves named in said note.

The record further shows, that after the rendition of said judgment, and after the death of said Rose, and, also, after the appellants had been made parties to said judg-

ment, as the executors of the last will and testament of said Rose, to-wit: at the October term of said court, in the year 1868, on motion of appellees, the said judgment was set aside, and a new trial granted, because said note was given for the hire of slaves.

After this, to-wit, at the March term of said court, 1869, the appellants, as the executors of said Howell Rose, moved the said court to set aside and vacate the said order granting a new trial, and to strike said cause from docket.

This motion of appellants was overruled, and a bill of exceptions was signed and sealed at their instance, which states, that the order of the court, setting aside said judgment and granting a new trial, was made under the ordinance No. 39, of the convention of this State, entitled "An ordinance to declare void certain judgments, and to grant new trials in certain cases therein mentioned," passed the 6th day of December, 1867. It is ordained by the first section of said ordinance, "that in all cases where judgments have been rendered, on penal statutes, where the object was declared in the statute, to assist in carrying on the late war against the United States, such judgments be and the same are hereby declared void and inoperative."

The judgment set aside in this case, is not a judgment rendered on a penal statute.

The second section declares, "that parties against whom judgments or decrees were rendered in courts of record, after the 11th day of January, 1861, and up to the time of the adoption of this ordinance, shall be entitled to a new trial on application, where the judgments were obtained, or the decrees procured, on contracts made *during the time designated*, where it was agreed between the parties, or understood, that the same should be discharged by the payment of Confederate currency or treasury notes; *provided*, the court shall be satisfied, from all the facts submitted by affidavit, by both parties, that a good and meritorious defense exists," &c.

It no where appears in this record, either by affidavits or otherwise, that the note, in this case, was "*made during*



*the time designated*" in this section of the said ordinance.

The only evidence upon which the judgment was set aside and the trial granted, is the affidavit of W. C. Bibb, one of the appellees, that the said note was made for the hire of certain slaves, named in the note, and that the consideration of said note and of said judgment, was for the hire of slaves.

This affidavit discloses no meritorious defense. If the third section of ordinance number 3 of said convention was a valid ordinance, the affidavit of said Bibb would disclose a meritorious defense; but that ordinance has, by this court, at this term, been declared unconstitutional and void.—*McElvain et al. v. Mudd*, *Adm'r*, decided at this term.

The third section of this ordinance only authorizes new trials to be granted in the cases named in it, where the court is satisfied from all the facts that may be submitted, by both parties, that a good and meritorious defense exists.

We have seen that the affidavit of the said W. C. Bibb does not disclose a meritorious defense, and that being the only evidence upon which the motion for a new trial was granted, it follows, that the new trial was unadvisedly and improperly granted, and, therefore, the motion of appellants to set aside and vacate the order granting a new trial, should have prevailed; and if we could revise the order and judgment of the said court below, overruling said motion, on appeal, we should not hesitate to reverse the order and judgment of said court, denying said motion. But we have held that an order, granting a new trial, is not such a final judgment as will support an appeal to this court, and that the remedy to avoid such an order, before final judgment, is an application to this court for a *mandamus*, to require the court, making such an order, to vacate and set aside the same, and that an appeal to this court, on such an order, will be dismissed on motion of the appellee.—*Broyles v. Maddox*, 43 Ala. 357.

The order and judgment of the said city court, upon which this appeal is taken, is not a final judgment.

By virtue of the order granting a new trial, the cause is still pending and undetermined in that court.

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The remedy of the appellants, therefore, to avoid that order, is not an appeal, but, as in the case of *Broyles v. Maddox*, an application to this court for a *mandamus* to have it set aside and vacated. The motion of the appellees to dismiss this appeal, therefore, must be granted.

Let the appeal be dismissed at the costs of the appellants.

### ROBISON ET AL. vs. ROBISON, PRO AMI.

[BILL IN EQUITY BY MARRIED WOMAN AGAINST HER HUSBAND AND HIS JUDGMENT CREDITORS TO ENJOIN SALE OF LANDS UNDER EXECUTION AGAINST HUSBAND, AND TO ESTABLISH A RESULTING TRUST IN HER FAVOR IN SAID LAND.]

1. *Parties defendant to bill in chancery, misjoinder of; how only can be taken advantage of.*—The objection of misjoinder of parties defendant to a bill in chancery can only be taken advantage of by those improperly joined, and is fatal to the suit only against them.
2. *Husband; when competent witness for wife.*—The husband is a competent witness for his wife to prove what disposition he has made of money belonging to her separate statutory estate.
3. *Resulting trust; what creates, and how may be proved.*—If a husband purchases an estate with money, *the corpus*, of his wife's separate estate, and takes a deed in his own name, a trust results to the wife which may be proved by parol.
4. *Same.*—To raise a resulting trust the money advanced must form the consideration of the purchase and be converted into land. A subsequent advance will not suffice.
5. *Husband, possession of property by; when will be considered possession of the wife.*—Possession by a husband of property to which a trust in favor of his wife has attached, is the possession of the wife.

APPEAL from Chancery Court of Butler.

Heard before Hon. ADAM C. FELDER.

The main facts of this cause are as follows: In the year 1860, L. H. Robison, the husband of complainant, at the request of his mother-in-law, who was the executrix of the estate of complainant's father, bid off, at a sale made by

the administrator of one Hawkins, deceased, the lands described in the bill, and executed his promissory note therefor, payable 12 months after date. No money was paid for the land until 1863, when the executrix of his wife's father, as a part of his wife's distributive share of said estate, and with the understanding that the money furnished was to pay the debt due for the land, and that the land was to belong to his wife, advanced to L. H. Robison a sum of money sufficient to pay for the land, which was accordingly done. On the 26th of January, 1863, Robison took a deed to these lands in his own name.

Early in the year 1861, L. H. Robinson executed to the Selma & Gulf Railroad Company a note for stock, which was transferred to Boyle, Milner & Co., for work done by them on said road in the spring of 1861.

Boyle & Milner, as surviving partners of Boyle, Milner & Co., brought suit upon said note, obtained judgment thereon, and caused the issue of an execution which was levied upon the lands described in the bill, which were duly advertised and sold by the sheriff in the year 1867, at which time, the date of filing the bill, Robison was insolvent.

At the sale, and before the bidding commenced, complainant, by her solicitor, fully informed all by-standers and bidders of her equities in the case, and that her husband had no real interest in said lands; this information was also privately given to the agent and to the attorney of Boyle & Milner, before the sale. Notwithstanding this, said Boyle & Milner, by their agent, purchased said lands, and received the sheriff's deed therefor.

The original bill and the amendments are filed by Mrs. Robison, by next friend, against her husband, L. H. Robison, Boyle & Milner, and the widow and children of Smith, a deceased member of the firm of Boyle, Milner & Co. The bill prays that the land described in the bill, be decreed to be the property of complainant; that the defendant, Robison, be directed to make a deed to her of the same; that Boyle & Milner, and their agents, &c., be perpetually enjoined from interfering with said lands, that the sheriff's deed be



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delivered up, cancelled and held for naught, and for general relief.

The defendants, Boyle & Milner, demurred to the bill, and among other causes, specified—

1st. For want of equity.

2d. That the widow and children of the deceased partner, Smith, are improperly made parties defendant.

The demurrer was overruled. The cause was submitted for final decree, on bill and amendments, answers and decree *pro confesso*, and the testimony of various witnesses; the substance of the testimony being as above set out.

Among the witnesses examined on the part of complainant, was L. H. Robison, husband of complainant, and a motion was made by the defendants, Boyle & Milner, to suppress his deposition, on the ground that the husband can not be a witness for the wife. This motion was overruled.

On final hearing, the chancellor granted the relief prayed for, decreed the land to be the property of complainant, and that the husband make a deed of the same to her; that the deed made by the sheriff be delivered up and cancelled, &c. The defendants appeal, and among other errors, assign—

1st. The decree rendered.

2d. Overruling the demurrer to the bill.

3d. Overruling the motion to suppress the deposition of L. H. Robison.

WATTS & TROY, and J. K. HENRY, for appellants.—1. The bill shows that the judgment of Milner & Boyle was obtained and levied, and lands advertised for sale, and was in the act of being sold, before any notice of the complainant's rights was made known to the judgment creditor. Under these circumstances, the lien of the judgment creditor is superior to the rights of the complainant.—See *Daniel v. Sorrells*, 9 Ala. 439; *Ohio Ins. Co. v. Ledyard*, 8 Ala. 870.

The complainant can not stand in a better light than a purchaser or mortgagee, under an unrecorded deed. Here the creditor acquired his lien by judgment and levy, before

there was any notice of the complainant's rights. The following cases would seem to be conclusive in this aspect of the case: *De Vendell v. Hamilton*, 27 Ala. 156; *Hardaway v. Semmes*, 38 Ala. 659.

2. But admitting that the facts set forth in the bill establish a trust, which could be enforced against the husband—a trust by implication or construction of law—still, it can not be enforced against the creditors who have a lien by judgment and levy. The statute (§ 1590 of Rev. Code of Alabama) declares, that “no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney, lawfully authorized thereto in writing.”

And the next section (1591) declares, that “no such trusts, whether implied by law, or created or declared by the parties, can defeat the title of creditors, or purchasers for a valuable consideration, without notice.”

Now, what is the meaning of the rather singular expression, “title of creditors,” as used in this section?

It is clear, that the section contemplates *both* the title of a purchaser for value without notice, and also the rights of creditors. It may be that the creditors whose rights are to be protected against these secret trusts, are general creditors, whose debts were created before notice of the trust, as in the case of *Hardaway v. Semmes*, 38 Ala., *supra*. But whether this be so or not, it is certain, if *any* creditors are to be protected, those who have acquired *liens* by judgments and levies, before notice of the trust, would be protected; or otherwise, the words “title of creditors” would be meaningless.

A mortgage creditor with a mortgage is a purchaser for value, and would be included in the other clause of the statute.—*Morrow v. Wells*, 36 Ala. 129. Under the registration statutes, where the term “creditors” is used, it has frequently been declared, it means creditors with a *lien*. See, also, *Fash v. Ravesies*, (32 Ala. 451,) which would seem to settle the matter.

3. We insist, that under the facts set forth in the bill, the

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complainant has no *equitable lien*. The purchase of the land by Robison, the husband, was made more than one year before the advancement of any of the money. His right to have a title under this purchase was complete, dependent alone on the payment of the purchase-money. It is well settled, under such circumstances, that there is no *resulting trust*, or any trust by implication or construction of law. In order to create such a trust, the money must be advanced at the time of the purchase.—See *Foster v. Atherman*, 3 Ala. R.; *Roper v. Roper*, 29 Ala. R.; *Steese v. Steese*, 5 Johns. Ch. p. 19; *Botsford v. Burr*, 2 Johns. Ch. 409, marg. page.

The statute of frauds (and the section 1590 of the Code of Alabama) show clearly that the trust here attempted to be set up could be enforced against Robison, the husband of complainant, because it is not such a trust as is excepted by the law from the operation of the statute of frauds and the section 1590 of the Revised Code.

The use of the terms in this section, trusts created “by construction or implication of law,” had a well defined meaning, and to extend the right to introduce parol testimony, to establish such a trust as is here attempted, would be to abrogate the statute of frauds.

The husband was clearly an incompetent witness for the wife at common law or in equity.—1 Greenl. § 334; *Gresley's Eq. Ev.* page 40, bottom of page; *Wilson v. Shepherd*, 28 Ala. 623. The incompetency was both on the ground of *interest*, and also on the ground of *public policy*.—See 1 Greenl. § 334; 28 Ala. 623.

If there has been any change of these principles, it is a change in derogation of common law, and must be *strictly construed*.—*Kirksey v. Dubose*, 19 Ala. 43; *Zackowski v. Jones*, 20 Ala. 189; *Nation v. Roberts*, *ib.* 544. That is, no change will be implied or presumed, beyond the clear language of the act making the change; but all presumptions are the other way—that is, that no change was intended but the one provided for in terms by the act.

What change has been made, then, as to the competency of witnesses? The only change made, is that found in section 2704 of the Revised Code. And this removes in-



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competency on the ground, first, of being a *party*, and secondly, on the ground of *interest*. This section provides, that "in suits, &c., there must be no exclusion of any witness, because he is a *party* or *interested* in the issue tried." The language is plain and explicit—there is no room for doubt or misconstruction. The general principles of the law declare, that witnesses are incompetent because of interest in the suit, because they are parties to the suit, or because of *public policy* under certain circumstances—as when the witness is a husband or wife, or an attorney, having confidential communications as such, &c. Now, these causes are separate and distinct grounds of incompetency, either of which may be removed and the other remain. It was competent for the legislature to remove the ground of incompetency as to a *party*, or as to *interest*, or as to *public policy*, and let the others remain, or to remove any two of the grounds, and let the other remain. And this is precisely what they have done, and no more nor less. They declare that neither *interest* or being a *party* shall not exclude, but they leave the exclusion on the ground of *public policy* as it was; and it still excludes all who were ever incompetent on this ground, whether husband or wife, or attorney, or a judge presiding on a case. And as well might it be contended that an attorney could, under this statute, disclose the secrets of his clients, as that the statute invades the sanctity of the marriage relation, and prostrates this great principle of *public policy*. The deposition of this witness should, therefore, have been excluded.

H. A. HERBERT, for appellee.

[Appellee's brief did not come into Reporter's hands.]

B. F. SAFFOLD, J.—The bill was filed by Frances W. Robison against her husband, Lodowick Robison, and Boyles & Milner, his judgment creditors, to establish a resulting trust in her favor of a certain tract of land. She charged that the land was sold on the 3d of December, 1860, by Allen Hawkins, as administrator of Wiley Hawkins, deceased, and bid off by her husband, who gave his

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own notes, due twelve months after date, for the purchase-money. These notes were paid with money of her separate estate derived from her father. Her mother, as executrix of his estate, advanced the money to her husband, Lodowick, who was unable to pay, under an express agreement with him, that he was to apply it to the payment of the debt for the land, and the land was to be her daughter's, the complainant, to constitute so much of her distributive share of her father's estate. The money was so applied, and the land paid for, but her husband took the deed in his own name on the 26th of January, 1863, after payment had been fully made, but she did not know this until subsequently. On the 22d of March, 1867, Boyle & Milner, as surviving partners of Smith, Boyle & Co., recovered a judgment against Lodowick Robison. The land was sold under an execution issued on this judgment, and purchased by Boyle & Milner, as surviving partners, with knowledge at the time of the sale of the complainant's equity.

The bill was demurred to by the defendants, Boyle & Milner, for want of equity, and for misjoinder of parties, by making the widow and children of the deceased partner, Smith, parties defendant. Their answer, not under oath, denied the allegations of the bill. The answer of Robison admitted the charges.

Those only who are improperly joined can demur for misjoinder of parties defendant. Where the objection of want of interest applies to a defendant, it is fatal to the suit only against the defendant improperly joined.—Story's Eq. Plead. §§ 544, 530, 232.

A motion to suppress the testimony of Lodowick Robison, on the ground that the husband can not be a witness for his wife, was overruled. Section 2704, of the Revised Code, removes the incompetency of witnesses because of interest or being parties to the suit in civil cases. The general rule, excluding husband and wife from being witnesses for or against each other, is founded, partly on their identity of interest, and partly on the necessity of guarding the security and confidence of the marriage relation.

The objection of interest applies more particularly to

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their being witnesses in favor of each other, and the other, to their being witnesses against each other.—Phil. Ev. vol. 1, p. 69.

The exceptions to this rule are, where, from the nature of the inquiry, the information to be expected is peculiarly within the knowledge of the husband or wife, and where, to exclude such evidence, would occasion insecurity to that relation of society which it is the object of the rule to protect.—*Ib.* 78.

The section of the Code referred to, removes the objection of interest, and being a party to the suit, leaving for consideration only that of public policy.

In cases where the reason of the rule does not apply, it has been the practice of the courts to make it yield to the demands of justice. Where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge him.—2 Kent's Com. 179. Where the husband and wife had agreed to articles of separation, and a third party became a party to the agreement as the wife's trustee, and provision was made for her maintenance and enjoyment of separate property, the declarations of the wife relative to her acts as agent were admissible in favor of her husband against the trustee.—*Fenner v. Lewis*, 10 Johns. R. 38.

In an action by the husband on a policy of insurance on the life of the wife, the husband having introduced the surgeon who examined her as a witness of her good health, who testified that his opinion was partly formed from her answers to his questions respecting her health, the defendant was permitted to give in evidence her declarations to another person about the same time, of her poor state of health at the time of, and soon after the examination by the surgeon. Lord Ellenborough said, "no confidence had been violated; nothing extracted from the bosom of the wife which was confided there by her husband. The admission of the evidence is free from the imputation of breaking in upon the confidence subsisting between man and wife." Grose, J., said "such declarations are admissible, not so much as evidence of confessions of the wife against her husband, as of the actual state of her health, in her own opinion, at the time." Lawrence, J., said, "The



ground of objection was, the account given by her went to criminate her husband, by showing him guilty of fraud, but that does not follow.”—*Aveson v. Kinnaird*, 6 East, 188. Where a man was tried on an indictment for a forcible marriage, the wife was received as a witness for her husband to prove that the elopement and marriage were voluntary.—Bristol Assizes, 1794; Mac. Nally’s Ev. 181, note 70, p. 78; Phil. Ev.

These decisions were made at a time when the identity of the wife, in the presumption of law, was merged almost entirely in that of the husband. A stricter rule should not now be observed when her individuality is being recognized, and her responsibility, at least in reference to her separate property, is almost as great as that of *femme sole*. In a suit against herself her own testimony can be used for or against herself. So of her husband and of these defendants. There is no exclusion on account of relationship, no matter how near and dear, save only in the case of husband and wife. In the case under consideration the wife desires to prove by her husband what he did with the money belonging to her separate estate, which he received from her mother. The law has made him her trustee and invested him with the control of her property, of which she can not divest him, except for good cause proven. He alone knows what disposition he has made of it. No confidence of the marriage relation is involved. A trustee is merely giving an account of what he has done with the funds of his trust. To deny this right to the wife would be to place her in a worse condition than all the balance of the world. The motion to exclude the testimony of the husband was properly overruled.

The appellant contends that the sale and purchase of this land was completed in 1860, and the money was not advanced by Mrs. Christian, until some time afterwards; that no resulting trust can arise unless the money was paid at the time the land was bid off. A contract for the sale of land can not properly be said to be completely executed until the money has been paid and a conveyance delivered, though important rights and obligations become vested in the parties by the simple agreement for a sale. The ques-

tion of the existence of a resulting trust depends, not so much on the time when the money is used, as the character of its receipt. A party may borrow money and apply it at once to the purchase of land without the creation of a resulting trust, but if it be advanced with the intention of such application, the trust will arise. In the case of *Bottsford v. Burr*, (2 Johns. Ch. Rep. 405,) Chancellor Kent said: "The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with proper moneys of the *cestui que trust*, and the deed not taken in his name. The trust results from the original transaction, at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It can not be mingled or confounded with any subsequent dealings whatever." "The trust arises out of the circumstance that the moneys of the real, and not of the nominal, purchaser, formed, at the time, the consideration of the purchase and became converted into the land. In this case the question was, was the money advanced as a loan to the defendant, or as a payment *pro tanto* by the plaintiff to the vendor." In the case of *Boyd v. McLean*, (1 Johns. Ch. Rep.) the trust was established, notwithstanding the land had been sold on a credit, and the money was not paid until several years after the sale. The decisions of this court in *Roper v. Roper*, 29 Ala., and *Foster v. The Trustees of the Atheneum*, 3 Ala., are based on the authority of *Bottsford v. Burr*, above. The testimony abundantly shows that the money of the complainant was received by her husband, who was her trustee, and applied as the consideration for the land with the express understanding that it was to be her property. The trust arose at the moment of the application of the money, and is not affected in favor of the defendants by section 1591, Revised Code, in which the word "creditors" must be construed to mean creditors with a lien.—*Wells v. Morrow*, 38 Ala. 125; *Fash v. Ravesies*, 32 Ala. 451. *Quere*,—whether it would not have arisen against such, to the extent of the money of the wife used in payment?

Mrs. Christian testified, that her daughter's slaves

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were employed on the land in conjunction with her own and her husband's, and that the husband recognized, and the wife claimed, the proprietorship of the land. The possession of the husband must be referred to his representative character, and be considered the possession of the wife, which is equivalent to notice of her right.—*Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233; *Michan and Wife v. Wyatt*, 21 Ala. 813; Shepherd's Dig. p. 701, § 28, title *Notice*. The bill alleges, and the proof sustains the allegation, that all of the purchase-money was paid out of the wife's property.

It is unnecessary to consider the objections to the specified portions of the testimony. The bill is sustained by the proof independently of them.

The decree is affirmed.

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## REYNOLDS, AUDITOR, vs. MCAFEE, SOLICITOR.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *Solicitors elected or appointed under section 17, of article 6 of the constitution; what salary not entitled to.*—Solicitors elected or appointed under the 17th section, of the 6th article of the constitution of Alabama, are not entitled to the annual salaries allowed to solicitors appointed under the Code of Alabama.
2. *Solicitor under Code; office of, abolished by constitution.*—The office of solicitor under the Revised Code of Alabama, is abolished by the present constitution of Alabama, and the annual salary attached to that office is abolished with the office.

APPEAL from the City Court of Montgomery.

Tried before Hon. J. D. CUNNINGHAM.

McAfee, the solicitor for Talladega county in this State, on the 12th day of July, 1869, applied to the Hon. John D. Cunningham, judge of the city court of Montgomery, for a rule *nisi* for *mandamus* against R. M. Reynolds, as



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the auditor of the State, for the purpose of compelling said Reynolds to issue a warrant to said McAfee, on the State treasurer, for the amount alleged to be due him as solicitor as aforesaid, at the rate of two hundred and fifty dollars per annum, since said McAfee was inducted into office as such solicitor.

The relator, said McAfee, shows in his petition that he was duly elected in said county as solicitor for the same, at the general election in February, 1868, and that he was duly commissioned as such solicitor on the 17th day of July, 1868, by the governor of this State, and was immediately thereafter qualified, and entered upon the discharge of the duties of his office as such solicitor, and has continued in said office and in the discharge of the duties thereof up to the date of his application, whereby he became liable to perform all the duties of said office, and entitled to all the profits, fees, and emoluments thereof. Thereupon, a rule *nisi* was granted, by said court, on this application, and served upon said auditor, who, on the 19th day of July, 1868, appeared in said city court, and showed cause against the issuance of any writ of *mandamus* against him, and in his answer denied the right of said relator to the salary claimed, upon the grounds that the office to which the said salary had attached had been abolished by the present constitution of the State, and said auditor affirmed in his said answer, that there was nothing due to the said relator as such solicitor, upon the claim set up by him in his said application.

Upon the return of the rule *nisi* and the hearing of the answer of the auditor, the court declared his answer to be insufficient, and a peremptory *mandamus* was ordered to be issued to compel the said auditor to draw his warrant on the State treasurer in favor of said McAfee, said relator, for the sum of two hundred and thirty-nine dollars and fifty cents, for the salary of relator from the 17th day of July, A. D. 1868, to the 30th day of June, 1869, inclusive; and the court also taxed the auditor with the costs of the proceedings in the city court. To this ruling and decision of the city court, the defendant Reynolds excepted, and had his exception made a part of the record in the court

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below. And thereupon he appealed to this court from the ruling and decision of the court below, and assigns the same in this court for error.

JOSHUA MORSE, Attorney-General, for appellant.

JEFFERSON FALKNER, *contra*.

PETERS, J., (after stating facts as above.)—Under the constitution of this State, which existed before the adoption of the one now in force, the provision for the appointment of solicitors was in these words :

“There shall be an attorney-general for the State, and as many solicitors as the general assembly may deem necessary, to be elected by a joint vote thereof, who shall hold their offices for the term of four years, and shall receive for their services a compensation, which shall not be diminished during their continuance in office.”—Const. Ala. 1819, art. 5, § 18; Code, p. 41.

The solicitors thus appointed were officers of the judicial circuits, for which they were so elected, in the State, and they were required to perform certain duties within these circuits. These duties were prescribed by law, and for neglect of them they were subject to certain penalties. Among other things, they were required to attend each regular term of the circuit court in their circuits, and remain until the business of the State was disposed of, and to attend each special term of the courts in their circuits held for the trial of a felony; and for the services thus rendered, they were each allowed an annual salary of two hundred and fifty dollars, besides fees for certain specific services.—Code of Ala. §§ 721 to 728, inclusive.

Under the constitution of the State now in force, the provision for the appointment of solicitors is quite different, and their duties are different. The provision is as follows :

“A solicitor shall be elected in each county in this State by the qualified electors of such county, who shall reside in the county for which he is elected, and perform such duties as may be required of him by law. He shall hold office for a term of four years, and in case of vacancy, such

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vacancy shall be filled by the judge of the circuit, until his successor is elected and qualified."—Const. of Ala. 1867, art. 6, § 17.

The salary allowed by the Code to the solicitor, was to the officers appointed under the Code, and required to perform the duties and services therein prescribed. That office has been abolished by the present constitution, and the salary and penalties attached to it were abolished and repealed with the office. The Revised Code was not adopted, as a whole, by the present government of the State, but only those laws and parts of laws which do not conflict with the constitution and laws of the United States, and the constitution of this State, were continued in force. Pamph. Acts 1868, p. 7.

The section 860 of the Revised Code, allowing a salary to solicitors, conflicts with the present constitution of the State. It was therefore abrogated by the constitution, and it was not continued in force by the act above cited. The office and the salary are both abolished. They are inconsistent with the present law.—*Cass v. Dillon*, 2 Ohio, 607; *D. & L. Plank Road Co. v. Allen*, 16 Barb. 15; *U. States v. Irwin*, 5 McL. 178; *Pearpont v. Crouch*, 10 Cal. 315; *Giddings v. Cox*, 31 Vt. 607. In such cases, *leges posteriores priores contrarias abrogant* is the rule.—*Johnson's Estate*, 33 Penn. St. R. 511; 2 Rolle, 410; 11 Coke, 626, 630; Smith's Com. on Stat. p. 905, §§ 788, 792. The remedy, in such cases, is in the general assembly, and not in the courts.

The court below erred in granting the application of the relator; its judgment is, therefore, reversed, and this court, proceeding to render the judgment in this court that should have been rendered in the court below, orders and adjudges that the application of said relator, said McAfee, be denied, and that said relator pay the costs of this court and in the court below.

NOTE BY REPORTER.—At a subsequent day of the term, the following response was made to an application by appellee for a rehearing, by



PETERS, J.—The application for a rehearing in this case is denied.

The learned counsel for the applicant omits to observe that the legislature have not adopted the Revised Code as a whole, but have only continued “in full force and effect” “all laws and parts of laws of the Revised Code of Alabama, *except* such as conflict with the constitution and laws of the United States, or the constitution of this State.”—Pamph. Acts 1868, p. 7.

It hardly needs an argument to show that the office of solicitor under the Revised Code, is not the same as that under the present constitution\* of the State, and that the law of the Code is in conflict with the constitution. . For this reason, it is not continued in force, so far as this office is concerned.—Revised Code, § 853; Const. of Ala. 1867, art. 6, § 17. No doubt that office is destroyed by the provision in the constitution above referred to. This being so, the salary expires with the office. The new officer takes the name of the old one, and is required to “perform such duties as may be required of him by law.” So far as these duties are prescribed by the Revised Code, they are still required to be performed; and so far as the law of the Code has been continued in force, but no farther.

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### PONDER ET AL. *vs.* SCOTT.

[BILL IN EQUITY TO RESTRAIN SALE OF LAND UNDER MORTGAGE AND FOR  
GENERAL RELIEF.]

1. *Deed, notice of intention to execute; what not notice of.*—Notice of an intention to execute a deed, is not notice of the contents of the deed as executed.
2. *Mortgage, recitals in; what not notice of.*—A recital in a mortgage that in case of a sale of the property, the proceeds are to be first applied to the payment of the amount secured to be paid by another mortgage on the same premises, is not constructive notice to the mortgagee of the contents of the mortgage referred to, when the mortgages are executed

on the same day, and there was an agreement, between the mortgagees and the mortgagor, that the mortgage having priority should contain stipulations different from those actually contained in it, there being no evidence as to which was first executed.

3. *Confederate money, payment of; when extinguishes debt.*—The acceptance of payment of a debt in Confederate currency, by the owner, in his own right and not in a fiduciary capacity, extinguishes the debt.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. ADAM C. FELDER.

This was a bill in equity, exhibited by the appellee, Scott, against the appellants, B. K. Ponder and F. H. Cobb, and sought to enjoin Ponder from selling certain lands mortgaged by Cobb to Ponder, and also to himself, on the same day, under an agreement to which all the parties to the suit were parties, on the ground that the mortgage executed by Cobb to Ponder, was given to secure a greater sum of money than the amount, which, by the terms of the agreement, was to be secured by the mortgage which was to have priority over complainant's. The facts in relation to this agreement are fully set out in the opinion.

The complainant, Scott, charged in his bill that the amount of the note, which was the consideration of the mortgage, was for a loan of money, with usurious interest included thereon, and prayed that an account might be stated between the defendants to ascertain the amount really due on the note secured by said mortgage, and also for general relief, and averred a willingness and readiness to pay into court whatever sum should be required to remove the incumbrance on said property by said mortgage to Ponder.

It was proven that complainant, before the filing of the bill, offered to pay Ponder the sum of \$1010, as the amount due on said mortgage, which was refused. The evidence also showed, that the note secured by mortgage to Ponder, was made up of the amount of a loan of money in 1859, with interest thereon at the rate of 10 per cent per annum, after scaling some payments made thereon in Confederate currency.

The cause was submitted, on bill, answers, exhibits and

the testimony. The final decree rendered by the chancellor, after adjudging the amount due Ponder on the note, after deducting usurious, and allowing lawful interest and payments proved, to be \$1093 63, entitled to a priority of payment out of the proceeds of sale of lands mortgaged, and stating amount found to be due complainant, decrees that both of the mortgages be strictly foreclosed ; that Ponder be perpetually enjoined from selling under the powers of sale in his mortgage ; that the defendant, Cobb, pay the amounts stated to be due Ponder, and complainant, and that the register, in default of payment thereof, sell the lands, &c., and out of proceeds, first pay Ponder, &c.

The errors assigned are (among others)—

1st. The decree of the chancellor.

2d. The relief granted respondent Cobb.

WATTS & TROY, for appellant.

RICE, SEMPLE & GOLDTHWAITE, *contra*.

B. F. SAFFOLD, J.—An agreement was made between the parties to this suit, by which Cobb and Scott were to exchange lands, and Ponder was to release Cobb's land from a mortgage held by him, and in lieu of it take another mortgage, for what was due on the first, on the land to be received by Cobb from Scott.

As a condition to his assent to this arrangement, and to a twelve months extension of time for payment of the debt due him, Ponder required Cobb to scale a payment which he had made on this debt in 1863, in Confederate money, and to give a new note for the amount they ascertained to be due. Scott was not informed of this transaction. Deeds, conveying the lands exchanged, were made by the proper parties. Cobb executed to Ponder a mortgage on the land received from Scott to secure the new note. He also mortgaged the same premises to Scott, to secure the balance due him on the exchange, providing for the sale of the property in default of payment, and disposing of the proceeds of the sale as follows : to the payment of, 1st, the costs of the sale ; " 2d, the amount secured to be paid to B. K. Ponder, by a mortgage on said premises ;" 3d, the amount due Scott, &c.



These deeds and mortgages were all executed on the same day, and filed for record on the next day after their execution.

Ponder being about to sell the premises conveyed by his mortgage, Scott filed his bill to enjoin him. He charges that he was induced to exchange lands with Cobb, and to allow Ponder's mortgage to have precedence over his, by the representations of Cobb and of A. F. Given, the agent of Cobb, that there was very much less due to Ponder than was claimed by him; that the agreement between Ponder and Cobb, to scale the payment made in Confederate money, and to give a new note, was unknown to him, and was a violation of their agreement with him. Ponder, in response, insists that the only agreement made by him was with Cobb, and that it was at Cobb's request that he consented to give up his first mortgage and take another on the other premises, provided it should have precedence over Scott's, and be for the amount due after scaling the payment in Confederate money. He admits that the understanding between the parties was that his mortgage was to be for the amount due on his first mortgage, but contends that the amount of the new note is the amount justly due on the said mortgage.

The bill asserts, and the answers and testimony of the defendants admit, that Ponder was to have a prior mortgage on the land, conveyed by Scott to Cobb, for the amount actually due on a mortgage held by him on the land conveyed by Cobb to Scott. The evidence shows, that, on the 23d of January, 1866, Cobb agreed with Ponder to scale the payment in Confederate money to its gold value, and gave him a new note for the balance thus ascertained to be due; that this transaction was made during the pendency of the negotiation for the exchange of lands, and was unknown to Scott.

It is contended by the appellant, Ponder, that the recital of his mortgage in the mortgage of Scott is sufficient to charge him with constructive notice of its contents. The proposition is well established that notice of an incumbrance on property is notice of its contents.—*Hall v. Smith*, 14 Vesey, 426; *Jones v. Smith*, 1 Hare, 43; *Story's Eq. Jur.*

vol. I, § 400. It is, however, not applicable to this case. The mortgage from Cobb to Ponder and to Scott were executed on the same day. The recital in Scott's mortgage, that the proceeds of the sale of the property should be applied to "the amount secured to be paid to B. K. Ponder by a mortgage on said premises," taken in connection with the fact admitted, that Ponder was to have a mortgage on the property, and the entire absence of proof as to which mortgage was first executed, can not sustain a presumption that will charge another with constructive notice to his manifest inquiry. Notice of an intention to execute a deed is not notice of the contents of the deed as executed.—Sugden on Vendors, vol. 2, p. 1058, § 68; Spencer's Eq. Jur. vol. 2, p. 758; *Cothey v. Sydenham*, 2 Bro. 391, 393; *McGregor v. Brown*, 5 Pick. 174; *Warden v. Adams*, 15 Mass. 233. One of the reasons of the law of constructive notice is that prior transactions shall prevail over subsequent ones, unless the omission of something to be done by the former contractor will cause injury to the latter. Nor should any presumption be indulged against either of these parties, under the particular circumstances of this case, from what appears to be the simultaneous execution of these mortgages. They thought they understood each other, and if either was honestly mistaken he is entitled to relief in equity.

Before and at the time of the execution of these deeds of sale and mortgages Scott had notice of an existing mortgage held by Ponder, on the land of Cobb. This mortgage describes a certain note as the evidence of its consideration. On this note were credits, not specifying in what currency paid, but using the general term "dollars," as did the promise to pay. Scott is charged with constructive knowledge of this. If we add to this knowledge, the information given to him by Cobb and by Given, who, as the agent of Cobb, paid the credits to Ponder, the reception by Ponder of the payment, his acquiescence in it for nearly three years, and his declaration that he would not have asked Cobb to scale the payment if he had not desired time on his debt, and the transfer of his mortgage to other property, we are obliged to conclude that Scott was justi-

fiable in acting on the belief that the incumbrance which he consented should be prior to his, was of insignificant amount, and that Ponder himself regarded his recent contract with Cobb as the valid consideration for his new note.

If the payment in Confederate money is no payment at all, or if it is valid only for the amount agreed on between Cobb and Ponder, then, by the terms of the agreement between all the parties, Scott has no case against Ponder. If it is valid for the full amount, expressed in its endorsement on the note, he is entitled to the relief he seeks. The Confederate currency was one of the agencies resorted to by the adherents of the Confederate government to carry on the war against the United States. But no law of that government or of the State of Alabama compelled a creditor to take it in discharge of his credits. There is no proof in this case that any duress was employed to command its acceptance. Ponder, as a free agent, could have refused it if he desired to do so, or he could have accepted it partially or conditionally. He could have forgiven the debt entirely, or cancelled it in whole or in part, for any consideration deemed sufficient by him. The Confederate money, we know, was worth something at the time it was offered. Whether worthless or not, it was tendered to him as a satisfaction of so much of the indebtedness due him. In the free exercise of his right to dispose of his property as he pleased, not being the agent, trustee, or representative of another, he accepted it as such, and he must be bound by it.

The chancellor proceeded to determine the indebtedness between the defendants. In this we think there is error. The pleadings do not put in issue their rights against each other. The new contract made by them may or may not be valid. The defense of usury is a personal privilege, and must be pleaded. Our conclusion is that the appellee is entitled to the relief for which he prays, but that a cross bill, or an amendment of the pleadings, is necessary to decide any issues between the defendants.

Decree reversed, and cause remanded.

NOTE BY REPORTER.—On 23d of July, 1869, the appel-



lants applied for a rehearing, to which the following response was made at the present term :

B. F. SAFFOLD, J.—The appellant applies for a rehearing on the ground, that by the decision rendered he loses the security afforded by his first mortgage, for the amount ascertained to be due to him from Cobb, after scaling the payments made in Confederate currency.

Ponder himself testifies that he required the scaling as the consideration of his consent to relinquish the land conveyed by his first mortgage, and accepted another on that which Cobb was to receive in exchange from Scott, and that he would not have asked Cobb to scale the payment if he had not desired time on his debt, and the transfer of his mortgage to other property.

Scott asserts, and Ponder admits, that the latter was to have a prior mortgage on the land conveyed by the former to Cobb for the amount actually due on the mortgage to be relinquished. The note secured by this last mentioned mortgage was endorsed with credits, not specifying in what currency paid, but using the general term "dollars." Scott was charged with knowledge of this note and the credits on it, and as Ponder admitted that he had received the credits at their nominal value, we held the note to be paid to that amount.

As the amount "secured to be paid" in the mortgage given by Cobb to Ponder, on the land received from Scott was not the amount due on the mortgage relinquished, and the two mortgages made by Cobb, one to Ponder, and the other to Scott, were executed on the same day, without any evidence of which was executed first, we can not, under the circumstances, hold Scott to a knowledge of the contents of the one to Ponder.

A rehearing is denied.

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 Ex parte Sims, Ex'r.
 

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## EX PARTE SIMS, EX'R.

[APPLICATION FOR MANDAMUS—PETITION TO ESTABLISH BILL OF EXCEPTIONS.]

1. *Courts, final adjournment of; power over judgments, after.*—After the final adjournment of a court, its judgments pass beyond its power and control, and become absolute, except for the purpose of correcting clerical errors and misprisions, where there is upon the record matter apparent enough to make such corrections, &c.; and no new trial can be granted, in such a case, at a subsequent term of the court.
2. *Act of December 17, 1868, and ordinance No. 39 of convention of 1867; what did not authorize.*—The act of the 17th of December, 1868, entitled "An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned, and to repeal sections 2876 and 2877 of the Revised Code of Alabama," and the third section of an ordinance of the convention of 1867, entitled "An ordinance concerning the value of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves," having been declared unconstitutional and void, give to the courts no jurisdiction or power to grant new trials in the cases therein named. Nor is such power given to the courts by the ordinance of said convention No. 39, except in cases where there is a meritorious defense; and the fact that the contract upon which a judgment is rendered, was given in consideration of slaves bought and sold, constitutes no meritorious defense, provided good faith was observed between the parties in making such contract.
3. *Appeal; what not such final judgment as will authorize.*—The error in granting a new trial at a subsequent term of the court, can not be corrected by an appeal to this court, before final judgment; for the reason, that an order granting a new trial, in such a case, is not a final order or judgment. The remedy to avoid such an error, is an application to this court for a *mandamus* to require the judge or court, making such an order, to vacate and set aside the same.

This was a petition to this court, by R. H. Sims, as executor of Berry Owens, deceased, to establish a bill of exceptions, and also for a writ of *mandamus*, to compel the Hon. J. Q. Smith, judge of the circuit court for Montgomery county, to vacate and set aside a certain order made by him in said court, &c. The facts necessary to an understanding of the opinion, are set out therein.

MARTIN & SAYRE, for petitioner.

No counsel, *contra*.

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Ex parte Sims, Ex'r.

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PECK, C. J.—At the July term of the circuit court of Montgomery county, in the year 1867, petitioner, as executor of Berry Owen, deceased, recovered a judgment against Israel W. Roberts, for the sum of two thousand, three hundred and four dollars, on a bill of exchange drawn by one Samuel Lacy, on, and accepted by, said Roberts, dated December 29, 1859, and payable on the first day of January, 1861, for the sum of fifteen hundred dollars, to the order of said Lacy, who, before maturity thereof, indorsed said bill of exchange, to said deceased, in his life-time.

The petition states, that said bill of exchange not being paid at maturity, was duly protested, &c., and that said bill, at the commencement of the suit, was due and unpaid. The summons and complaint were duly served on said Roberts.

The judgment entry, made a part of said petition, states, that said Roberts came by his attorney, and withdrawing his plea, said nothing in bar or preclusion of plaintiff's demand; and thereupon, judgment was rendered for petitioner, for the said sum of two thousand, three hundred and four dollars, and the costs of said suit.

The petition also states, that afterwards, to-wit, on the 29th day of January, in the year 1869, said defendant, said Roberts, moved said court to have said judgment opened, and a new trial granted, on the grounds, that the original cause of action originated prior to the 25th day of May, 1865, and, also, to have said judgment to be declared null and void, on the grounds that the said bill of exchange was for the purchase-money of a slave. This motion was allowed by the court, and a new trial was granted.

On the hearing of this motion, the petitioner excepted to the ruling of the court, and a bill of exceptions was signed and sealed by the judge.

The petition states, that the bill of exceptions signed by the court, is not the one prepared by petitioner's counsel, which petitioner states was correct, and which was presented to said judge, the Hon. J. Q. Smith, to be signed, but which he refused to sign, but struck out and erased a part thereof, and inserted other matter, that is incorrect



and was not excepted to ; and that the bill of exceptions, as signed, is untrue, and deprives petitioner of all the benefits of his exceptions as really made, &c.

The petitioner prays this court to establish his bill of exceptions, as set forth and presented in his petition. He also prays for a writ of *mandamus*, directed to the Hon. J. Q. Smith, judge of the circuit court of Montgomery county, commanding him to vacate the judgment of said court, rendered at the January term thereof, opening the said judgment of petitioner, in the said case against said Roberts, and granting him a new trial therein, and that the judge of said court be required to re-instate his said judgment against said Roberts, so set aside, &c., as aforesaid. The view we take of this case, renders it unnecessary to consider the question as to the bill of exceptions.

After the final adjournment of the court, by which the judgment of petitioner was rendered against the said Roberts, the said court ceased to have any power over the same, except that power that is incident to all courts of general jurisdiction over their judgments—that of correcting clerical errors, where the record affords matter upon which to base such correction. After final adjournment, the judgments of courts *become absolute and conclusive*, and the courts have no further power over them.—*Van Dyke v. The State*, 22 Ala. 54 ; and the case of *Weaver v. Lapsley*, decided at the Janury term of this court, 1869.

The circuit court of Montgomery, therefore, had no power to set aside the judgment in this case, and to grant a new trial, unless such a power was conferred by the act of the 17th December, 1868, entitled “An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned ; and to repeal sections 2876 and 2877 of the Revised Code of Alabama ;” or, under the 3d section of ordinance No. 38 of the convention of 1867 of this State, entitled “An ordinance concerning the value of contracts, where the consideration was Confederate bonds or currency, and for the sale of slaves.”

If said act and order were constitutional and valid, then the said circuit court would have had jurisdiction to grant the new trial in this case ; but the whole of said act, and

the 3d section of said ordinance, have been declared unconstitutional and void by this court.—See the cases of *Sanders v. Cabaniss*, and *Weaver v. Lapsley*, at the last January term of this court, 1869, and the case of *McElvain v. Mudd, Adm'r*, at this term. Consequently, the said circuit court had no jurisdiction or power to set aside said judgment and grant a new trial.

The only ground alleged for setting the said judgment aside, and granting a new trial, as appears from the motion of said Roberts, is, that the said bill of exchange was given for the purchase of a slave, and for that reason, is alleged to be without consideration. The case of *McElvain v. Mudd, Adm'r, supra*, decides that the sale of slaves, after the date of the president's emancipation proclamation, and before the suppression of the late rebellion, is a sufficient consideration to support contracts. Certainly, then, such sales, made before the rebellion began, must be legal and valid.

The motion, and the order of the court on the same, granting a new trial, can not be sustained under the third section of the ordinance of said convention No. 39, for the reason, that no meritorious defense is disclosed. There is no merit in the fact, that the consideration for the said bill of exchange was the sale and purchase of a slave. The said court, therefore, set aside the said judgment, and granted the new trial, without any authority or legal ground for so doing.

The remedy for such an error, before final judgment, is an application to this court for a *mandamus*, to compel the court granting the new trial to set it aside, and to re-instate the judgment, and to issue execution on the same. No appeal will lie to reverse such an order, because it is not a final order or judgment.—*Broyles v. Maddox*, at last term.

Let an order *nisi*, in the nature of an alternative *mandamus*, issue, directed to the circuit court of Montgomery county, to be served on the judge of said court, commanding said court to vacate and set aside the order granting a new trial in said case, and to re-instate said judgment, and to issue an execution on the same; or, that said judge show

cause, at the next term of this court, on the first motion day of the division of which said county of Montgomery forms a part, why he has not done so.

## MONTEVALLO COAL MINING CO. vs. REYNOLDS.

[CERTIORARI—MOTION TO DISMISS APPEAL.]

1. *Adjournment of court, record of proceedings after; what can not be brought to supreme court by certiorari.*—The record of proceedings, in the court below, after its final adjournment, and after appeal to the supreme court, except an amendment of the record of the entry of the judgment *nunc pro tunc*, or of some of the proceedings antecedent thereto, can not be brought up to this court, upon the return of a *certiorari* sent down to the court below, upon a suggestion in this court of a diminution of the record.
2. *Same; what can be brought to this court on appeal.*—Only the record up to the final judgment, including the record of the final judgment itself, can be brought to this court on appeal from such final judgment. What happens after the final judgment, in the court below, except a correction *nunc pro tunc* of the judgment, or other proceedings antecedent to the judgment, is no part of the record upon which errors can be assigned in this court, on an appeal from such final judgment.
3. *Appeal; when will be dismissed.*—If the final judgment in the court below is set aside on motion of the appellant, and a new trial granted after the appeal from such final judgment, and whilst the same is pending in this court, although such order of the court below may be erroneous, such appeal will be dismissed on motion of the appellee, in this court, after the grant of such new trial.

The appellee, in this cause, moves to dismiss the appeal, because, since said appeal was taken and while the same was pending in this court, the court below, on motion of the appellant, set aside the final judgment appealed from and granted a new trial in the cause, and because there is now no final judgment from which to appeal. The appellant resists this motion and submits a counter motion for an *alias certiorari*, &c.

The facts of the case will be found in the opinion.



JOHN W. A. SANFORD, for appellant.

CHILTON & THORINGTON, for appellee.

PETERS, J.—At the last term of this court, the appellee in this suit obtained a *certiorari* to the city court of Montgomery, in which this cause was tried and determined, to bring up a more perfect record of the proceedings in the court below. This writ was returned to the present term of this court, and the clerk of the city court sent up with it, as a more complete record of the transcript of the record of certain proceedings arising on a certain motion, made in said city court at the October term thereof in 1869, by the appellant in this suit, to vacate and set aside the judgment rendered in this cause in the city court, on the 14th day of March, 1868, from which this appeal was taken; and a certain other motion made in said city court in this cause at said October term, 1869, made by said appellee, to amend the entry of judgment in the court below *nunc pro tunc*, so as to show a proper service of the summons on said appellant. These motions were heard and determined at the same time. The motion of the appellant was granted by the court, but the motion of the appellee was denied. To this ruling of the court the said appellee objected, and reserved his objection by bill of exceptions. The record shows that this appeal was taken on the 21st day of May, 1869.

The appellant now moves, in this court, to set aside the return thus made on said *certiorari* awarded at the June term, 1869, of this court, and also for an *alias certiorari*.

The appeal from the judgment of the city court removed the case out of that court into this court, and the city court can not act further in the matter then, without an order from this tribunal, so long as the appeal is pending, except to execute the judgment, when no supersedeas bond has been given, or to amend the entry of the judgment below *nunc pro tunc*.—Revised Code, §§ 3485, 3489; *John Berry, Receiver, &c.*, 26 Barb. 55; *Fuber v. Carter*, 2 Sneed, 1; *Stone v. Spillman*, 16 Texas, 432; *Stalbird v. Beattie*, 36 N. H. 455; *Kembrough v. Mitchell*, 1 Head, 539; *Archer v.*

*Hart*, 5 Florida, 234; *Spaulding v. Milwaukee, &c., R. R. Co.*, 11 Wis. 157.

But, in this State, the record of a judgment may be amended by an entry *nunc pro tunc*, by the court in which it was rendered, during the pendency of an appeal, so as to make the record speak the truth. And after the record is so amended, a *certiorari* will be awarded to bring up the amended record; or when such record, so amended, is brought up to this court by a *certiorari* issued before the amendment was made, it is properly before this court, and will be considered on an assignment of errors here. This has been the practice of our predecessors.—*Townsend v. Jeffries, Adm'r*, 24 Ala. R. 329; *Cunningham v. Fontaine*, 25 Ala. 644; Rev. Code, § 2807; *Sartor v. Br. Bk. Montgomery*, 29 Ala. 353; 24 Ala. 468.

But, generally, after the appeal is taken, the judgment in the court below can not be vacated and set aside, or opened so as to introduce new matter into the record which was not properly a part of the record at the date of the judgment. The correction of the entry of judgment *nunc pro tunc* is not such an addition of new matter to the record, but only such an amendment of the record as shall make it speak the truth of the proceedings in the court below up to the judgment, including the record of the judgment itself. After final judgment and the adjournment of the court, the record, if it speaks the truth, can not be increased or diminished. Such judgment, until it is reversed or a new trial granted, is a finality.—*Hudson v. Hudson*, 20 Ala. 364; *Kidd v. Montague*, 19 Ala. 619; *Chamberlain v. Gailard*, 26 Ala. 504; *Deslonde v. Darrington*, 29 Ala. 92; *Harris v. Billingsley*, 18 Ala. 438.

Here the transcript shows that the record sent up with the *certiorari* is not the record of the proceedings in this case, before the entry of the judgment in the court below or before the judgment itself. Nor is it a correction of the record *nunc pro tunc*. It is, therefore, improperly sent up to this court, as a part of the record in this case antecedent to the appeal.

The motion to set aside the return to the *certiorari* is therefore granted, and the same is ordered to be set aside.

But the motion to grant the award of an *alias certiorari* is denied. No diminution of the original record is suggested, and no reason for its allowance is shown.—11 Rule Prac. Rev. Code, 817.

The cross motion, made by the appellee in this court, to dismiss the appeal must prevail. It is admitted by the eminent counsel who makes it, and the counsel who represents the appellant, that the judgment below from which the appeal has been taken, has, upon the motion of the appellant in that court, been vacated and set aside since the appeal, and that there is now no longer any final judgment in that court. A record of the proceedings upon the motion to vacate and set aside the judgment in the court below, filed in this cause, shows the same fact. It may have been an error in the court below to do this, but as it was done at the instance of the appellant, he has no right to complain of it. He consented to it, and consent takes away error. *Concensus tolet errorem* is the rule which must govern in such cases.—Coke's Litt. 126; Broom's Max. 129; *Rogers and Wife v. Conger et al.*, 7 John. 611, 558; Revised Code, § 3504. Where there is no final judgment in the court below, the appeal will be dismissed.—*Broyles v. Maddox*, June term, 1869.

Let the appeal be dismissed, at appellant's costs.

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## MONTGOMERY & EUFAULA R. R. Co. vs. TREBLES.

[ACTION BY INDORSEE AGAINST INDORSER ON A BILL OF EXCHANGE RE-ISSUED AFTER PROTEST.]

1. *Indorsement, denial of execution of, or authority to make; how only can be taken advantage of.*—Since the adoption of the Code of 1852, an objection to an averment in a complaint against a corporation, that the defendant indorsed a bill of exchange by its president, A. S., involving a denial of the execution of, or want of authority to bind by, the indorsement, can only be taken advantage of, by plea verified by affidavit.



2. *Indorser before maturity, extent of liability for putting bill in circulation after dishonor; how and by whom ascertained.*—When an indorser before maturity puts a bill of exchange into circulation, after its dishonor, the nature and extent of his contract is a question of fact, to be ascertained by the jury, from his intention as shown by the evidence.
3. *Indorser; duty of, when indorser is liable only on second indorsement.*—If the indorser's liability is by virtue of his second indorsement only, the indorsee must demand payment of the acceptor, and give notice of his failure to pay, within a reasonable time, to be determined by the jury according to the evidence; but if the indorser intended to stand in reference to the bill as an indorser whose liability was fixed, no subsequent demand and notice is necessary.

APPEAL from City Court of Montgomery.

Tried before Hon. THOMAS M. ARRINGTON.

The complaint in this case is as follows: "The plaintiff claims of the defendant five thousand dollars, due on a bill of exchange which was drawn by J. W. Echols, dated Montgomery, Ala., January 11th, 1860, and payable on the first day of January, A. D. 1861, for the sum of five thousand dollars, to the order of the president and directors of the Montgomery & Eufaula R. R. Co., which said company, by its then president, Arnold Seale, endorsed said bill after maturity thereof to the plaintiff, and after the same was duly protested, of which defendant had due notice, and said defendant thereby became liable to pay said bill and interest thereon. The said bill, with the accruing interest due thereon is still unpaid, and plaintiff avers that after the said bill was re-issued by the said company as aforesaid, the payment thereof was demanded of said Echols, who failed to pay the same, and notice of his said failure was given to said company before bringing this suit."

The defendant demurred to the complaint, assigning, among other grounds—

1st. That there is no averment that Seale had authority to indorse for the company.

2d. That the complaint does not show where payment was demanded after the re-issue of said bill and notice given. The court overruled the demurrer.

The bill of exceptions does not show that the overruling

of the demurrer was excepted to, but the same is noticed both in the argument of counsel, and in the opinion.

On the trial of the cause, the plaintiff offered to read in evidence a bill of exchange corresponding with that described in the complaint, except that it was payable at the Central Bank at Montgomery, Alabama. It was indorsed "Arnold Seale, president," and also with the names of five persons, but these were erased by lines drawn through them with a pen, and the following words were written beneath them: "The above names erased and bill transferred to Noble & Brother, this day, 25th March, 1863. Joseph D. Hopper, Secretary."

The defendants objected to the admission of the bill with its indorsements, on the ground of variance between it and the one described in the complaint. The objection was overruled, and defendant excepted. The plaintiff, after proving due protest, notice, &c., proved by Tichenor that about the 16th of March, 1864, the said bill was transferred to him by Noble & Brother, in the same condition in which it then was; that within about three weeks after obtaining the bill he demanded payment of Echols, and at the close of the war, in 1865, he notified the then president of the company that Echols had failed to pay it, and that he looked to the company for payment. Subsequently he transferred the bill to B. B. Davis. The plaintiff also proved that the indorsement on the bill, purporting to have been written by Joseph D. Hopper, was in his hand writing, and that he was secretary at the time it bears date, March 25th, 1863. The plaintiff then proved the transfer of the bill from Davis, by successive transfers, to himself.

This being all the evidence, the court, at the request of the plaintiff, charged the jury that if they believed the evidence they must find for the plaintiff. The defendant then asked the court to charge the jury, that "if they were satisfied the indorsement of the defendant was made before maturity, they must find for the defendant." This charge was refused. To the charge given, and the refusal to charge as requested, the defendant excepted, and now, with other objections to proceedings in the court below not necessary to be noticed, assigns the same for error.

WATTS & TROY, for appellant.

CHILTON & THORINGTON, *contra*.

B. F. SAFFOLD, J.—The bill of exceptions does not state that the appellant excepted to the overruling of his demurrer to the complaint because there were no averments of Seale's authority to indorse for the company, and of the place where payment was demanded after the re-issue. As these objections are argued by both parties, we will decide them.

The strongest authority cited by the appellant in support of his first ground of demurrer is found in the case of *May v. Kelly & Frazier*, 27 Ala. 497. There the averment was, that the captain of the steamboat accepted for the owners, and the court held that in declaring against the principal on a bill accepted by his agent, the authority of the agent to accept must be averred. It should be observed that this acceptance was made before the Code of 1852 went into operation. Under the law prior to the Code, the requirement of a sworn plea to deny the execution of an instrument, the foundation of the suit, was restricted to instruments purporting to be made by the defendant himself. As the *onus* of proving the exception was upon the plaintiff, when he alleged that it was done by an agent of the defendant, the averment of his authority to execute became necessary. The Code, however, expressly requires all pleas which deny the execution by the defendant, his agent, partner, or attorney, of any instrument in writing, the foundation of the suit, or the assignment of the same, to be verified by affidavit.—Rev. Code, § 2640. The form of the plea, prescribed by the Code, requires the pleader to aver that the instrument was not executed by him, or by any one authorized to bind him in the premises.—Rev. Code, p. 678. In the case under consideration the averment of the complaint is, the defendant indorsed the bill by its president, Arnold Seale. To this averment no objection can be taken by demurrer, nor can proof of its execution be required unless denied by a sworn plea.—*Roney, Adm'r, v. Winter*, 37 Ala. 277; *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476; *Deshler v. Guy*, 5 Ala. 186; *McWhorter v.*



*Lewis*, 4 Ala. 198; *Lazarus v. Shearer*, 2 Ala. 718; *Fowlkes & Co. v. Baldwin*, *Kent & Co.*, *ib.* 705; *Stringfellow & Hobson v. Mariott*, 1 Ala. 573; *Skinner v. Gunn*, 9 Por. 305; *Martin v. Dortch*, 1 Stew. 479.

The question of variance between the bill offered in evidence and the one described in the complaint, will receive solution in the consideration of the rights and obligations of the parties respecting the former bill.

At the instance of the Central Bank, this bill was protested at maturity, and due notice thereof given to the drawer and indorsers. Afterwards, about the 25th March, 1863, as appears by the writing of J. D. Hopper, the secretary of the defendant, the indorsement of the directors was erased and the bill transferred to Noble & Brother, and by successive transfers to the plaintiff. It is a fair presumption, if not actually proven, that the defendant had regained the bill after protest, and re-issued it. Was the indorsement prior to protest *ipso facto* extinguished by regaining the bill? Could the defendant only negotiate it again by another and distinct indorsement? If so, then, perhaps, the holder should again have demanded payment of the acceptor, and given notice of non-payment, within a reasonable time. This seems to have been the view taken by this court in the cases of *Branch Bank at Montgomery v. Gaffney*, 9 Ala. 153; *Adams, Adm'r, v. Torbert*, 6 Ala. 865; *Kennon v. McRea*, 7 Por. 175. Whether an indorser who again puts a bill into circulation after protest means to be bound by his second indorsement, or his first, on which his liability is fixed, seems to be a question of fact, to be determined by the jury according to the evidence. That he can make either agreement with his transferee is evident.

In the case of *Hullum v. The State Bank*, 18 Ala. 805, the defendant, Hullum, who was not a party to the bill before protest, indorsed it after the bank had acquired it, and after protest, at the instance of one of the indorsers whose liability was fixed. The court held that the nature and extent of his contract should be ascertained from his intention, as shown by the evidence, and thus *tested*, that he

intended to stand in reference to the bill as an indorser whose liability was fixed.

The bill of exchange in this case was transferred by the defendant, in March, 1863, to Noble & Brother, and by them in March, 1864, to Tichenor, who, three weeks afterwards, demanded payment of Echols, and in 1865, after the war, gave notice of his non-payment to the defendant. Whether a demand and notice after dishonor was necessary depends on the intention of the defendant in re-issuing the bill.

The charge given by the court, at the request of the plaintiff, was erroneous in assuming to determine the exercise of due diligence on the part of the holder, and the nature and extent of the contract of the defendant, to be ascertained from his intention, as shown by the evidence. *Hullum v. The State Bank*, 18 Ala. 805; *Br. Bk. at Montgomery v. Gaffney*, 9 Ala. 153.

The bill offered in evidence was properly admitted. Its legal effect, as between the particular parties to the suit, was sufficiently stated in the complaint. After maturity and protest it was not requisite to present it again at the bank. The time at which that was to be done had passed, and there was no new appointment of any place where payment should be demanded. In *Puckett v. King, Upson & Co.*, the court says the note was not described according to its legal effect. The defendant had contracted to pay at a particular place on a stated day, and not absolutely and wherever the note might be presented to him.

The charge asked by the defendant was properly refused.

The judgment is reversed and the cause remanded.

## EX PARTE BOYNTON.

[CERTIORARI FROM SUPREME COURT TO PROBATE COURT, AND SUPERSEDEAS TO SUSPEND AND SUPERSEDE PROCEEDINGS IN SAID COURT.]

1. *Certiorari*; when proper remedy.—*Certiorari* is a proper remedy to remove, for revision, a cause from the probate to the appellate court, where the order, decree, or proceeding, complained of, is claimed to be void.
2. *Same*; what should be done in primary court before applying for.—A motion to set aside the void action ought, however, to be first made in the primary court.
3. *Same*; when resort may be had directly to supreme court.—If such action occurs in a court from which an appeal may be taken to this court, or before a judge or court equal in authority and jurisdiction to any other inferior judicial tribunal, resort may be had directly to this court for the exercise of its powers of general superintendence and control of inferior jurisdiction.—(PECK, C. J., *dissenting*.)

This was a motion to dismiss the *certiorari*, and to quash the *supersedeas* issued in this case. The facts upon which the motion is based, fully appear in the opinion.

ALEX. WHITE, *pro motion*.

PETTUS & DAWSON, *contra*.

B. F. SAFFOLD, J.—The petitioner, W. N. Boynton, alleges, that being the executor of the will of Alanson Saltmarsh, deceased, he was removed from his office by an order of the probate court, rendered on the 17th day of August, 1869, which time was not a day of any regular term to which said case was adjourned; that afterwards, on the 15th of September, 1869, he moved the said probate court to vacate and set aside the order removing him, which motion was heard and refused on the 10th day of November, 1869.

Upon affidavit stating these facts, he applied for and obtained, in vacation, a *certiorari* to bring the proceedings in the cause directly into this court for revision, and a su-



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persedeas to suspend further action in the probate court until the final determination of this court in the matter, and he asks for such relief as is in the power of this court to render. The motion to dismiss is upon the ground, that the remedy of the applicant was either by appeal to this court, or by *certiorari* returnable to the circuit court.

An appeal to this court from the order removing him, would have been an appropriate remedy for the petitioner, if the order had been irregular and simply erroneous. But the objection taken to it is, that it is void. An appeal from it, therefore, would probably, under late precedents of this court, have been dismissed at his costs.—*Hays v. Cockrell*, 41 Ala. 75; *Garrison v. Burden*, 40 Ala. 513.

The action now sought of this court is a revision of the proceedings of the probate court. For this purpose, the proviso to the second section of article 6 of the constitution gives authority for the issuance of the necessary writ. It is said that application must be first made to the circuit court. Why so? The jurisdiction of the probate court in respect to the grant of letters testamentary and of administration is original, general and unlimited.—Const. of Ala. art. 6, § 9; *Gray's Adm'r v. Cruise*, 36 Ala. 559. The circuit court can have no greater jurisdiction. Besides, all of the statutes providing for appeals from the probate court, give them concurrently to either the circuit or supreme court. I construe the discretion thus allowed to be that of the party appealing. The case of *Ex parte Burnett*, (30 Ala. 461,) was one in which the prisoner applied directly to this court for the writ of *habeas corpus*, which had been denied him by the probate judge. The court said: "So far as judicial functions were invoked in this case, neither a chancellor nor a circuit judge had larger powers than the judge of probate. We know of no principle of law which requires the petitioner, after failing in his application to the judge of probate, to go for redress to either of those judicial officers, or the courts over which they preside, before coming to this court and asking our superintendence and control of that inferior jurisdiction."

*Ex parte Henderson*, (June term, 1869,) is antagonistic to this decision, but it is based upon authorities which do not

sustain the proposition, that this court can not by *certiorari* take jurisdiction of this case. *Ex parte Simonton* (9 Por.) was a case of application to the supreme court in the first instance for a writ of *habeas corpus*. Collier, C. J., said : "To bring the case within the qualifying terms of the proviso, (Const. art. 7, § 2,) it should be shown that some court or judge invested with authority to act, had undertaken to decide upon the case." *John v. The State*, (1 Ala.) and *Ex parte Tarleton*, (2 Ala.,) were cases before courts from which no appeals were provided. In *Ex parte Russell*, (29 Ala.) the prohibition sought was in a matter about which the jurisdiction of the probate court was limited. In *Ex parte Floyd*, (39 Ala.,) application was made for an order to the clerk of the circuit court superseding a writ of restitution in a case of unlawful detainer. The court said it could not require the clerk to correct any error into which he may have fallen, nor could it, by direct action, correct such error. The case of *Field v. Milly Walker*, (17 Ala. 80,) was brought up by *certiorari* to the judge of the county court, and was a proceeding by *habeas corpus* before him.

The principle running through all of these cases is, that if the proceedings complained of occur in a court from which an appeal may be taken to this court, or before a judge or court equal in authority and jurisdiction to any other inferior judicial tribunal, resort may be had directly to this court for the exercise of its powers of general superintendence and control of inferior jurisdiction.

The proceedings preliminary to a resort to this court for relief prescribed in *Ex parte Croom*, (19 Ala. 561,) have been exactly complied with in this case. Application has been made to the probate court to set aside the order removing the executor, and has been refused. The facts upon which the petition invokes action are set out in writing, to-wit, the transcript from the records of the court, and are certified to by the judge. I admit that we may refuse to hear this case on the ground that the necessity is not indispensable, as there may be a resort to the circuit court. If the order complained of is void, as it is claimed to be, the course taken by the applicant is regular and free from *laches*. Grave consequences to the parties interested

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are involved. All subsequent proceedings in the probate court, or in other courts, respecting the estate, and the rights of other parties in relation to it, may hereafter be held to be nugatory. If we send the parties to the circuit court, delay will be occasioned, costs will be incurred, and tedious litigation entailed upon them. The necessity for revising the proceedings of this inferior jurisdiction is little short of imperative, and the authority to do so is given both by statute and the constitution.

The supersedeas granted is not intended to have any greater effect than to stay the proceedings pending in the probate court, just where they are now, until the further order of this court in the matter.

The motion to dismiss the *certiorari* and to quash the supersedeas is overruled.

PECK, C. J., (*dissenting.*)—During the recent vacation, on the application and petition of Wm. N. Boynton, to one of the judges of this court, a writ of *certiorari* was ordered to be issued by the clerk of this court, directed to the probate court of the county of Dallas, commanding the judge of said probate court to send, certified, to this court, a complete transcript of certain proceedings said to have been had in said probate court.

Upon looking into said petition, it is seen that these proceedings consist of an order of said court removing said petitioner, as executor of the last will and testament of Alanson Saltmarsh, deceased, late of said county, and the appointment of an administrator *de bonis non*, with the said will annexed, making an order requiring petitioner to file his accounts and vouchers for a final settlement, and an order of said court, on the petition and application of said Wm. N. Boynton, refusing to set aside said orders and proceedings, and to vacate the same, and to restore said petitioner to his office of executor of the said last will and testament of said Alanson Saltmarsh, deceased. With said writ of *certiorari*, a writ of *supersedeas* was prayed for and issued, to suspend and supersede the proceedings of said probate court in the premises, until a hearing and the further order of this court in this matter.



A motion is now made in this court to dismiss said writ of *certiorari*, and to quash the *supersedeas*, upon the grounds that this court had no jurisdiction to issue a writ of *certiorari* in such a case. 2d. That there is an adequate remedy, by appeal, to revise and reverse an order of the probate court, removing an executor or administrator from his office as such executor or administrator.

2. Section 2 of article 6 of the constitution of this State declares, that "except in cases otherwise directed in the constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the State, *under such restrictions and regulations*, not repugnant to this constitution, as may, from time to time, be prescribed by law; *Provided*, that said court shall have power to issue writs of injunction, *mandamus*, *habeas corpus*, *quo-warranto*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."

Section 5 of the same article ordains, that "the circuit court shall have original jurisdiction, in all matters civil and criminal within the State, *not* otherwise excepted in the constitution; but in civil cases only, when the matter or sum in controversy exceeds fifty dollars."

Section 747 of the Revised Code provides, that "the circuit judges have authority to grant writs of *certiorari*, *supersedeas*, *quo-warranto*, *mandamus*, and all other remedial and original writs, which are grantable by judges at the common law."

Section 602 of said Code provides, that "the judges of the supreme court have, each of them, authority to issue writs of *certiorari*, injunction, and *supersedeas*, subject to the limitations prescribed by this Code, as judges of the circuit courts are authorized to grant the same."

This, clearly, does not mean that the judges of the supreme court may issue writs of *certiorari*, in all cases where such writs may be issued by judges of the circuit courts. It only means that the judges of the supreme court, in proper cases, may issue such writs in the same way or manner that the judges of the circuit courts issue like writs.

The judges of the supreme court have no jurisdiction to issue writs of *certiorari*, to review the proceedings of inferior criminal courts. That can only be done by the circuit courts, or the judges thereof.—*John (a slave) v. The State*, 1 Ala. 95. If they can not issue such writs, to review the proceedings of such courts in criminal cases, upon what principle can they issue such writs, to review the proceedings or these courts in civil cases? Certainly, there is no reason of necessity; for the judges of the circuit courts have undoubted jurisdiction to issue writs of *certiorari* in all proper cases, to review the proceedings of all inferior courts, whether civil or criminal; they issue these writs in all cases where they are grantable by judges at the common law.

But this court, by the second section of the constitution above referred to, except in cases otherwise directed in the constitution, exercises appellate jurisdiction only, *under such restrictions and regulations*, not repugnant to the constitution, as may, from time to time, be prescribed by law.

In cases like the one we are considering, (judgments and orders of the probate courts removing executors and administrators.) the law has prescribed how, in what way, and within what time, such judgments and orders may be revised and reviewed in this court.

Now, this being so, can they be revised in this court in any other way? I readily admit, that the writ of *certiorari* is a way, often times, of removing proceedings from an inferior to a superior court for revision, but it is not an appeal, although it may operate in the nature of an appeal.

A *certiorari* is a writ that may be, and usually is resorted to, to revise the proceedings of inferior courts, where no express mode is provided, to remove their proceedings to an appellate tribunal.—*John (a slave) v. The State*, *supra*, page 96.

If the petitioner is without fault, in not taking an appeal in this case, for the reasons disclosed in his petition, he is not without remedy, unless this court interposes for his relief. The circuit courts have a clear jurisdiction in the

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premises, and are not hedged in by any constitutional restrictions, in the free exercise of their jurisdiction.

This court can not issue this writ, under the proviso to the said second section of the constitution, because its object is not to give this court a superintendence and control over an inferior jurisdiction, but its object is to revise and review an order and judgment of an inferior court. But if that were its object, the necessity contemplated by the constitution does not exist, as there are other judges and courts that can issue the writ; and, consequently, there is no necessity for the interposition of this court.—*Ex parte Henderson*, decided at the last June term of this court; *The Simontons, ex parte*, 9 Por. 383; and *Ex parte Russell*, 29 Ala. 717.

I have examined with much care the decisions of this court, and have been able to find no case where this court has issued a writ of *certiorari*, in a case at all analogous to this, unless the case of *Field v. Milly Walker et al.*, (17 Ala. 80,) be such a case; but I doubt whether that is such a case. I know the reporter states, at the beginning of the said case, as reported, that it is a "*certiorari* to the judge of the county court of Tuskaloosa," but the case nowhere states it was a *certiorari* issued by this court; it may, for aught that appears, have been issued by the circuit court, and so, have reached this court by appeal or writ of error; besides, I have examined the said case, as it appears on the docket of this court, (the clerk not being able to find the transcript itself,) and it is there stated thus: "The matter of the petition of Milly Walker *et al.*, for a *habeas corpus*."

If it was a *certiorari*, issued by this court directly to the county court of Tuskaloosa, it is an isolated case, and the question as to the propriety of its being so issued does not seem to have been made or considered by this court. In my examination, I have found many analogous cases where the writ of *certiorari* was issued by the circuit courts, and in those cases it is said the remedy is by *certiorari* from the circuit courts.

In the case of *Fowler v. Trewhit*, (10 Ala. 622,) it is decided that a refusal of the orphans court to entertain a



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petition for a share in the distribution of an estate, can not be redressed by a writ of error; that the remedy is by *certiorari* in the circuit court.

So, in the case of *Stout, Ingolsby & Co. v. Ward, Adm'r*, (10 Ala. 628,) it is held that a creditor, whose claim is rejected on a final settlement of an insolvent estate, who is not a party to the final decree, can not sue out a writ of error; that his remedy is by *certiorari* from the circuit court.

In the case of *Cawthorne v. Weisinger*, (6 Ala. 714,) it is ruled, that a writ of error can not be prosecuted, upon the settlement of an insolvent estate, until a final decree is made; but any creditor who may conceive himself injured by a rejection of his claim, may, by *certiorari*, remove the record into the circuit court, and have the question reconsidered; and for the improper admission of a claim, the remaining creditors may also seek redress in the same way.

These are only a portion of the cases to be found in our reports, more or less analogous to the question now under consideration, which, I think, satisfactorily show that the writ of *certiorari*, to revise and review the orders, judgments and proceedings in inferior courts, can properly only be issued by the circuit courts, or the judges of said courts. But, without absolutely deciding this question, I do not feel at liberty to assume and exercise a doubtful jurisdiction, where there is no pressing necessity for it, and where there are other judges and courts that have a clear and undoubted jurisdiction in the premises.

For these reasons, I feel constrained to dissent from the decision of this court just announced, and, in my opinion, the *certiorari* ought to be dismissed and the writ of *superseas* quashed.

BARCLAY *vs.* HENDERSON ET AL.

[BILL IN EQUITY, BY WIDOW AGAINST HEIRS OF HUSBAND, PRAYING DIVESTITURE OF TITLE OUT OF HEIRS TO CERTAIN LANDS, OF WHICH HUSBAND DECLINED TO TAKE MARITAL POSSESSION, THE MERE LEGAL TITLE BEING IN HIM, AND RECEIVED BY THE HUSBAND, DURING MARRIAGE, IN EXCHANGE FOR OTHER LAND BELONGING TO THE WIFE, IN 1839, BEFORE HER MARRIAGE.]

1. *Marital possession ; what amounts to an abandonment of.*—A man who married in this State before 1842, and declined to take marital possession of the wife's estate during his coverture, but left the same under her control, and declared that the same belonged to her and not to him, up to the day of his death in 1862, waived and abandoned his marital rights over her estate.
2. *Same ; when equity will interfere to remove cloud from title.*—In such a case, on the death of the husband, the right of the wife revives, and equity will interfere to remove a cloud from the title of her land, unintentionally occasioned by the husband and wife in adjusting the deed of conveyance, on an exchange of one tract of land for another tract for her benefit.

APPEAL from Chancery Court of Talladega.

Heard before Hon. B. B. McCRAW.

The bill in this case was dismissed, "upon motion of respondents, for want of equity," on the eleventh day of February, 1869, before the cause was brought to issue upon the merits. It was filed on the twentieth day of May, 1867, in the chancery court of Talladega county, by Mrs. Margaret A. Barclay, "as executrix and legatee under the will of George P. Brown, deceased," against the heirs-at-law of said Brown and others, as defendants. From this decree of dismissal, Mrs. Barclay appealed to this court, and here assigns the dismissal for error.

The allegations of the bill show that Mrs. Barclay was the widow of said George P. Brown, deceased, and that by his last will, he made her, at his death, the sole legatee of his estate, for and during her natural life. Brown died on the eighteenth day of September, 1839, in this State, and his will was duly proven and admitted to record in

said county of Talladega, and his widow, now Mrs. Barclay, was appointed, as required by law, administratrix with the will annexed of his estate, and as such took possession of his estate. At the time of Brown's death he owned and possessed a lot of land in the town of Talladega in this State, on which he resided at his death, and for which he had paid a part of the purchase-money, leaving a balance still unpaid. This lot was purchased from William P. Chilton, who was the uncle of Mrs. Barclay, and who retained the legal title to said lot in himself. This lot was considerably improved by Brown, before his death, and he left his wife, this complainant, in possession of it at his death. After Brown's decease, and the administration on his estate by complainant, she intermarried with Hugh G. Barclay.

After this marriage, Mrs. Barclay, her husband, and said Chilton, agreed with her to exchange certain other lots of land in said town of Talladega with her for the lot left her by her first husband, Brown, at his death, and Chilton was to pay Barclay, her second husband, for her, the sum of \$1,600. This sum was the difference in value between the lots so agreed to be exchanged. This exchange was carried into effect, and Chilton paid Barclay, for complainant, the sum of \$1,600, above mentioned. Under this exchange Mrs. Barclay took possession of the lots thus obtained. This occurred in the year 1842. Afterwards, Chilton, without any request from Mrs. Barclay, and without her knowledge or consent, made a deed of conveyance to the lots thus exchanged with him by Mrs. Barclay, to her husband, said Hugh G. Barclay. This deed was intended to operate for the benefit of Mrs. Barclay, who was then a married woman, and the wife of said Hugh G. Barclay. Mrs. Barclay was then incapable of holding the legal title to said lots of land, and expected that her husband, said Barclay, would provide by deed or otherwise so that she might hold said lots free from all claims of said Hugh G. Barclay and his creditors. Said deed was so made by said Chilton, of his own will, and not by or from any suggestion on the part of the said Hugh G. Barclay, or of his said wife. Ever after said exchange, complainant claimed said lots as



her own property, and her husband, said Barclay, never made any claim of any kind thereto, but always recognized and spoke of the same as the property of his wife, up to his death, which happened suddenly and unexpectedly on the 17th day of September, 1862, affording him no opportunity of making a will or placing the title of said lots out of himself for the benefit of complainant. Said Barclay, said husband, had no claim on said lots, and held the same only by the naked legal title obtained as abovesaid from said Chilton.

The bill also alleges that Barclay made some improvements on the lots above mentioned, but that the cost of such improvements would be fully compensated by the occupation thereof by said Barclay, in conjunction with complainant for about twenty years, and by the sixteen hundred dollars which he had received from said Chilton, for complainant, on the exchange of said lots. It does not appear that there are any creditors of Barclay who contest Mrs. Barclay's right. The relief sought is such as is appropriate to the case made by the facts.

CHILTON & THORINGTON, for appellant.

TAUL BRADFORD, *contra*.

PETERS, J., (after stating facts as above.)—Upon a motion to dismiss for want of equity, the allegations of the bill are all admitted to be true. They are to be taken as facts, and complainant is entitled to the benefit of every legitimate conclusion that may be reasonably drawn from them.

At the death of Brown, his wife, now Mrs. Barclay, under the limitations of his will, became the owner of his estate just as he had owned it before his death. But upon her marriage with Barclay, her right to her personal estate was transferred to him by the effect of the marriage, and the use of her real estate passed in the same way, if she chose to assent to this, acquiescing in his possession without objection, and he chose to exert his right under the marriage. If, however, she did not choose so to acquiesce, she might, by bill in equity, compel the husband, before taking

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possession of her personal assets, to make provision and settlement for her benefit. But the husband was not bound to take possession of his wife's personal property or the rents of her land. He might, if he chose, decline to do either, and leave her estate with her, upon a dissolution of the marriage, as he found it on the first consummation of the marriage. If he and she assent to this, and act upon it during their whole marital life, it can not be said that he has ever acted upon his right to take possession of her property and hold it as his own, to the extent of his rights by marriage, during the coverture. If he does not do this, upon his death, her rights revive as they existed before the marriage, and the husband will be treated as he considered himself, and as she considered him, as her trustee of her estate in his hands at his death.—*Hawkins v. Coalter*, 2 Por. 436; *Andrews & Bro. v. Jones*, 10 Ala. 400, 401; *Marsh v. Marsh*, June term, 1869; *Robison v. Robison*, January term, 1870.

The allegations of this bill show such a case. The husband declined to take marital possession of his wife's estate from his marriage to his departure from this life. He acted solely as her trustee. This was his intent and purpose, and she acquiesced in it throughout their marriage life. It would be a fraud upon her to permit this purpose to be defeated.

The bill was, therefore, properly filed, and there was sufficient equity to sustain it. It was improperly dismissed. The decree of dismissal is reversed, and the cause is remanded for further proceedings in the chancery court in conformity with this opinion, and in accordance with the law.

And the appellees in this court will pay the costs of this appeal in this court and in the court below.

## HUFF, ADM'R, vs. DAVISON, GAURDIAN.

[DISCONTINUANCE—SERVICE OF PROCESS.]

1. *Discontinuance; what will operate as.*—Where several executors or administrators are sued, service of summons on one is sufficient, and a discontinuance, without cause apparent on the record, as to one, will be a discontinuance of the action.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

The facts are stated in the opinion.

COCHRAN &amp; DAWSON, for appellant.

S. J. CUMMING, *contra*.

B. F. SAFFOLD, J.—The summons and complaint were against three administrators. Service was effected on one, and the other two were not found. The judgment was taken against the one served. This operated as a discontinuance as to those not served. It is claimed by the appellant that there was a discontinuance of the entire action.

Section 2551 of the Revised Code provides, that service of the summons on one of two or more executors or administrators is sufficient for all. All who have qualified are required to be sued, if within the jurisdiction of the court. The judgment must be taken against all who are sued, or a sufficient reason must appear on the record why it is not done. Under the operation of section 2551, there can not arise a case of service on one and not on the others. It has been repeatedly decided by this court, that a discontinuance as to a party served is a discontinuance of the action.—*Caruthers & Kinkle v. Mardis' Adm'rs*, 3 Ala. 599; *Owen v. Brown*, 2 Ala. 126; *Williams & Ivey v. Sims*, 8 Port. 579.

The judgment is reversed and the cause remanded.



LAWSON *vs.* MOORE.

[APPEAL FROM ORDER OF CIRCUIT COURT SETTING ASIDE ITS JUDGMENT AT A SUBSEQUENT TERM, AND GRANTING A NEW TRIAL.]

1. *Appeal; when does not lie*.—An appeal will not lie to this court, to revise and correct an order of the circuit court, made at a subsequent term, setting aside a judgment of said court, and granting a new trial. Such an order is not such a final judgment as will authorize an appeal to this court, and if an appeal be taken on such order, it will be dismissed by this court, at the costs of the appellant.
2. *Mandamus; remedy to avoid such order*.—The remedy to avoid such an order is to apply to this court for a *mandamus* to require the court, making such order, to set aside the same, and to re-instate the judgment so set aside, and to issue execution on the same.

APPEAL from the Circuit Court of Bullock.  
Tried before Hon. J. McCaleb Wiley.

The facts appear in the opinion.

RICE, SEMPLE & GOLDTHWAITE, for appellant.  
J. N. ARRINGTON, *contra*.

PECK, C. J.—On the first day of January, in the year 1863, the appellee purchased of appellant certain lands, for four thousand dollars, and gave his note for the purchase-money, payable on the first day of January, 1864.

On the 8th day of January, 1866, the parties compromised this note, and the appellee gave his note to the appellant for the sum of two thousand, six hundred and sixty-six 67-100 dollars, payable one day after date, with interest from the said first day of January, 1864. This note is payable in specie, or its equivalent.

At the fall term of the circuit court of Bullock county, in the year 1868, the appellant recovered a judgment against the appellee for the sum of three hundred and thirteen dollars and thirty-three cents on this note.

At a special term of the circuit court of said county, held on the first day of February, 1869, said court, on the

motion of appellee, set aside said judgment and granted a new trial.

The appellant excepted to the ruling of said court, setting aside said judgment and granting a new trial, and his bill of exceptions, setting out the evidence on said motion, was signed and sealed by the presiding judge and made a part of the record. This bill of exceptions sets out the matters here stated, and other evidence not necessary to be here mentioned.

The appellant appealed from this order and judgment of said court setting said judgment aside and granting a new trial, and here assigns the same for error.

This appeal must be dismissed, because the said order granting a new trial, &c., is not such a final judgment as will authorize an appeal to this court.

At the last term, the appellant made an application to this court, founded on the transcript certified to this court on said appeal, for a *mandamus* to the circuit court, to compel said court to vacate and set aside the said order granting a new trial, &c. Said application has been held under advisement until this time. We presume the new trial, in this case, was granted under the first section of ordinance No. 38, of the convention of 1867. At the time said new trial was granted, that section of said ordinance had not been before this court for consideration. At the last term, we had occasion, and it became necessary, to consider and determine the constitutionality of said section, in the case of *Roach, Adm'r, v. Gunter*. In that case, we declared said section unconstitutional and void, because it impaired the obligation of contracts.

This section, then, gave the circuit court no jurisdiction or power to set aside the said judgment and grant a new trial, after the final adjournment of the term of the court at which the said judgment was rendered. By the common law, after the final adjournment of a court, it ceases to have any power over its judgments, except to correct clerical errors and misprisions, where enough appears on the record to do so.—*Van Dyke v. The State*, 22 Ala. 54. We have decided the same question in the same way, in *Weaver*

*v. Lapsley*, at the January term, 1869, and in several other cases since that time.

The circuit court, therefore, unadvisedly granted a new trial in this case; and the remedy to correct this error is not by appeal, because the order granting said new trial is not such a final judgment as will warrant an appeal to this court. The only remedy is an application to this court for a *mandamus* to have the said order vacated and set aside, and to re-instate said judgment and issue execution on the same.

Let an order *nisi*, in the nature of an alternative *mandamus*, issue in this case, directed to the court of Bullock county, to be served on the presiding judge of said court, commanding said court to set aside and vacate the said order granting a new trial in this case, and to re-instate the judgment, and to issue execution on the same, or that said judge show cause, at the next term, on the motion day of the division to which said county of Bullock belongs, why he has not done so.

Further, let the appeal be dismissed, at the costs of the appellant.

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### ALFORD, ADM'R, vs. EUBANK.

#### [WHAT CONSTITUTES RECORD—BILL OF EXCEPTIONS.]

1. *Bill of exceptions; when does not constitute part of the record.*—A bill of exceptions not signed nor dated, constitutes no part of the record of the cause in which it purports to be taken; nor does the certificate of the probate judge whose signature was required, that the transcript contained the bill of exceptions, cure the defect.

APPEAL from Probate Court of Montgomery.  
Tried before Hon. DAVID CAMPBELL.

The opinion contains the facts.



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Alford, Adm'r, v. Eubank.

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MARTIN & SAYRE, and JOHN A. ELMORE, for appellant.  
WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—This is an appeal from a decree of the probate court, rendered on the final settlement of an administrator's accounts, and must be tried on a bill of exceptions, unless the error complained of appears upon the record.—Rev. Code, §§ 2247, 2250; *Bartee and Wife v. James*, 23 Ala. 34.

The errors alleged are certain credits allowed to the administrator, but the objections to them are founded on facts stated in a writing purporting to be a bill of exceptions, but no where else apparent on the record. This professed bill of exceptions is not signed by the judge, nor dated.

The law is imperative, that the bill of exceptions must be signed during the term of the court at which they are taken, or within ten days thereafter, by consent of counsel, in writing.—Rev. Code, 2760. This court has repeatedly decided that this must affirmatively appear from the record to have been done, or it will be rejected.—*Union India Rubber Co. v. Mitchell*, 37 Ala. 314; *Haden v. Brown*, 22 Ala. 572.

The certificate of the probate judge reciting that the transcript contains the bill of exceptions, though made by the officer whose signature was required, can not be construed as a signing of the bill, or as an appearance from the record that it was signed during the term, especially as it was made several months after the close of the term.

The judgment is affirmed.

BOWIN & CO. *vs.* SUTHERLIN.

[ACCEPTANCE OF SERVICE—CONSENT TO RENDITION OF JUDGMENT, IF CAUSE OF ACTION BE NOT SETTLED BEFORE FIRST TERM OF COURT.]

1. *Summons and complaint, acceptance of service of, by one member of firm; how binds firm.*—Acceptance of service of a summons and complaint by one partner in the name of the partnership, is equivalent to service on all in respect to their joint property.
2. *Filing pleas; effect of.*—Filing pleas in defense of an action is a recognition by the defendant of the case as in court, and is a waiver of any defect or irregularity in the service of process.
3. *Acceptance of service, indorsement of agreement on; what, will not preclude defendant from contesting action.*—An indorsement on a summons by the defendant that he consents to a judgment being taken against him at the earliest term of the court at which it can be rendered, when no delay or advantage accrues thereby to the defendant, is without consideration, and will not preclude him from defending the suit, if he revokes his consent before the judgment is rendered.

APPEAL from the Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

The facts upon which the case turns are sufficiently stated in the opinion.

LANE & GAMBLE, and HERBERT, BOWIN & REYNOLDS, for appellant.

JUDGE & BOLLING, and WALKER, MURPHEY & WINTER, *contra*.

B. F. SAFFOLD, J.—A suit having been commenced by the appellee against the appellants, who were partners, one of the defendants, Reynolds, made the following indorsement on the summons and complaint: "Service accepted and copy waived, and, if not settled before, we consent that the cause may be placed on the docket at the spring term of the circuit court for Butler county, 1869, and that judgment may be rendered at said term in favor of plaintiff, this, February 20th, 1869." Signed, "E. Bowin & Co." At

the spring term of the court, which was the next term after the issuance of the summons, the plaintiff caused the case to be put on the trial docket, and on the last day of the term, which was after the day set for the trial of the cause, moved the court to enforce the agreement indorsed on the summons, and to give judgment in his favor, in pursuance of it.

The defendants objected to any consideration of the motion, on the ground, that they had filed pleas in bar of the action, that the court had no jurisdiction of the cause, and that it had not been regularly reached. These objections were overruled, to which the defendants excepted.

The substance of the action of the court was, that, on the last day of the term of the court, and after the day set for its hearing, the cause was called for trial. The execution of the indorsement on the summons by Reynolds, one of the firm of Bowin & Co., was proved, and judgment was rendered against the defendants, notwithstanding they had previously filed pleas, in disregard of their promise not to defend. The court refused to hear any defense, holding the defendants estopped by their agreement.

Inasmuch as service on one partner is equivalent to service on all, at least in respect to their joint property, these defendants were regularly in court, on proof of the acceptance of service by one. They had also appeared and filed pleas, which was a waiver of any irregularity in the service of process.—Revised Code, § 2538; *Lampley v. Beavers*, 25 Ala. 534. There was no error in calling the case at any time during the term, after the day set for its trial, notwithstanding other preceding causes had not been called or disposed of.—*Womack v. Bookman*, 34 Ala. 38.

The defendants' consent to a rendition of judgment was a gratuitous promise, revocable at any time before the judgment was rendered. The only injury which could possibly have resulted to the plaintiff, was a continuance of the cause, on account of not being ready for trial. The agreement of the defendants was a waiver of rights on their part, without a corresponding obligation of any sort on the part of the plaintiff. The term of the court was the first after the commencement of the suit. He had granted



no delay or advantage to the opposite party whatever. In all of the authorities cited by the appellee, the agreement of the parties to be bound had been passed on by the judgment of the court, and objection taken afterwards. When this is the case, every thing is to be intended which can favor the judgment. A promise in writing to pay the debt of another, in consideration of forbearance to sue, is valid; but if the creditor has no legal right to sue during the time which he promises to forbear suit, the promise to pay is without consideration and void.—*Martin v. Black's Ex'rs*, 20 Ala. 309; *Jones v. Ashburnham*, 4 East's Rep. 455. To make a promise obligatory, there must be some benefit to the party making it, or some detriment to the party to whom it is made. In this case, the defendants consent that a judgment may be taken against them at the earliest time the plaintiff can possibly obtain it without the promise. There was, then, no benefit to them. What did the plaintiff undertake to do in consideration of this promise? Nothing that was communicated to the defendants. He merely forbore, perhaps, to prepare his case for trial, and on this account would have been entitled to a continuance. But the promise of the defendants was not in consideration of this failure of preparation; it was but a declaration at the time that they did not intend to defend. We can not presume that they had no defense then, or that none accrued to them afterwards. It was at most but a promise to pay money which they already owed. If the plaintiff had declared to them that he would not sue them at all on their note, would he have been precluded from suing? If he had promised to dismiss the suit, could he have been forced to do it?—See Comyn's Dig. p. 323, (Action upon the Case upon Assumpsit); *Erwin & Williams v. Erwin*, 25 Ala. R. 236; *Forward et al. v. Armistead*, 12 Ala. 124; *Kirksey v. Kirksey*, 8 Ala. 131.

The court erred in refusing to allow the defendants to defend the suit. It is unnecessary to consider the other assignments of error.

The judgment is reversed, and the cause remanded.

NOTE BY REPORTER.—At a subsequent day of the term,

the appellee applied for a rehearing, to which the following response was made :

B. F. SAFFOLD, J.—The appellee, on application for rehearing, insists that there was a consideration sufficient to support the obligation of the appellants that judgment should be taken against them. He says they expected to, and did save some costs, and that he suffered detriment by the precedence which other causes obtained on the docket. Such considerations can not be regarded as inuring between the parties. The case was to be put on the docket at the first term after the acceptance of service. If it could not be then tried, it can not be held the fault of the defendant.

It is not denied that courts have power to enforce, in a summary way, agreements relative to the trial and disposition of causes before them. But this is more than such an agreement. The right of one partner to bind another in this way not to defend a suit; the subsequent payment of the money; fraud in making or obtaining the agreement; the existence of some valid defense, are some of the questions which might arise in such a case. The construction contended for by the appellee would even preclude the grant of a new trial, no matter how unjust the recovery might be shown to have been. It is against the spirit of the law to enforce such an agreement.

The rehearing is denied.

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CURRY *vs.* DAVIS ET AL.

[ACTION ON PROMISSORY NOTE, GIVEN IN COMPROMISE OF A DEBT DUE FOR PURCHASE OF SLAVES, IN 1863, AFTER EMANCIPATION PROCLAMATION OF THE PRESIDENT.]

1. *Compromise; what valid consideration for notes.*—A compromise in

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Curry v. Davis et al.

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good faith, of certain notes made in 1863, in consideration of the purchase of slaves in the same year, and after the emancipation proclamation of the president of the United States, whereby the amount of the first claim was largely abated, and a new note executed in consideration of such compromise, is a sufficient legal consideration to sustain such note; and this, even if the third section of ordinance No. 38 of the convention of 1867 was not unconstitutional. The fact that said third section is unconstitutional, places the question beyond doubt.

2. *Claim that may be invalid, compromise of; what defense can not be set up against note for.*—If parties, the one owning and the other owing a claim that may be invalid, entertain doubts about the validity of the claim, and make an honest compromise of it, a note given in consideration of such compromise is valid, and on a suit on such note, the invalidity of the claim compromised can not be set up.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

One of the appellees, John N. Davis, purchased from the appellant certain slaves, in 1863, and after the emancipation proclamation of the president of the United States. For these slaves, Davis executed several promissory notes, some of which fell due after the war. In 1866, Davis was sued upon some of these notes, and while said suits were pending, "Davis was informed that the supreme court had decided that notes given for the purchase of slaves could be recovered on, and was advised if he could compromise the outstanding notes to do so. The appellee, Davis, thereupon went to the plaintiff and compromised the outstanding notes for one-half of what was due thereon, and gave his note on the 28th of February, 1867, for the amount agreed on, and appellant dismissed the pending suits." This occurred before the passage of ordinance No. 38 of convention of 1867. It was proved that the compromise was made at the solicitation of the appellee, Davis; that he expressed himself as perfectly willing to pay the amount agreed on, and said that it was just and proper that he should do so, and that he gave the note as a full and fair compromise of the claim.

The note given in compromise of the debt due for the purchase of the slaves, not being paid, the appellant brought suit against the appellees in 1868. The defense set up was, that the notes sued on were given in compromise of other



notes given in 1863 for the purchase of slaves, and that under ordinance No. 38, of the convention of 1867, no action could be maintained thereon; and on the trial, the foregoing being all the evidence, the court charged the jury, "that although the evidence establishes a compromise between the parties, yet as laws are never to act retrospectively, unless it is made so by express words, that therefore the proviso to the third section of ordinance No. 38 of the constitutional convention of Alabama, adopted December 6th, 1867, in respect to compromises and settlement of transactions concerning the purchase-money of slaves, does not apply to compromises and settlements made before its adoption, and hence, if the jury believed the evidence, they must find for the defendant."

This charge is now assigned as error.

W. C. OATES, for appellant.

F. M. WOOD, *contra*.

PECK, C. J.—The notes, the subject-matter of the compromise, made the 28th day of February, in the year 1867, were valid notes, and sustained by a legal consideration. They were notes given on the sale of slaves made by the plaintiff to the defendant, John N. Davis, in this State, in the year 1863.

The decision in the case of *McElvain v. Mudd, Adm'r*, at this term, is decisive of this question. It holds that notes made in consideration of slaves, sold in good faith, between the 1st day of January, 1863, the date of the president's proclamation, commonly known as the emancipation proclamation, and the suppression of the late rebellion, are valid, and supported by a sufficient consideration.

It is not denied that the said compromise was made in good faith by both parties, and was made at the instance of the defendant, said John N. Davis.

The adoption of the ordinance No. 38 of 1867, after the date of the said compromise, even if free from any constitutional objection, in no way affected the said compromise, but the fact that the third section was unconstitutional and void, and has been so decided, leaves the validity of said

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compromise free from any doubts, whatever doubts may have existed on the subject before that decision was made.

The learned judge seems to have supposed, that to uphold the said compromise, would be to give the proviso to the said third section a retrospective operation, and for that reason he held the said compromise to be invalid. It does not appear to have occurred to him, that the purpose of the said ordinance, almost exclusively, was to operate retrospectively—to operate on things past, and not on things future; that it was to affect sales of slaves made, and notes given, before its passage. This mistake lead him to charge the jury, that the said proviso did not apply to compromises and settlements before the adoption of said ordinance; and, therefore, he charged the jury, that if they believed the evidence, they must find for the defendants. That charge is, manifestly, erroneous, and for this error, the judgment is reversed, and the cause is remanded for another trial.

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### ARRINGTON, SOLICITOR, *vs.* VAN HOUTON ET AL.

[APPEAL FROM ORDER REFUSING MANDAMUS.]

1. *Mandamus; when will not be granted.*—If a county treasurer fails, on demand, to pay a claim which has been duly allowed, filed and registered, as prescribed by law, against such county, when there are funds in the county treasury to pay the same, he and his sureties become liable to a motion and judgment, in the name of the party to whom such claim is payable, for the amount thereof. In such a case, therefore, *mandamus* will not be awarded to compel the payment of such claim, as there is a sufficient remedy by motion or suit on the treasurer's bond.

APPEAL from the Circuit Court of Barbour.  
Tried before Hon. J. McCALEB WILEY.

The facts are fully stated in the opinion.

S. F. RICE, for appellant.

F. M. WOOD, *contra*.

PETERS, J.—This is a controversy arising out of a demand for the payment of conflicting claims, by the county treasurer of Barbour county.

On the conviction of one John Smith, in the Barbour circuit court, at the spring term thereof, 1866, on a charge of assault and battery, the appellant Arrington, as solicitor of said circuit in which Barbour county, in this State, is included, became entitled to a solicitor's fee of fifteen dollars, which was taxed in the costs against said Smith. Execution was issued against Smith, and returned "no property found," at the fall term of said court after said conviction. Arrington then presented his claim to the county treasurer of said county of Barbour, and had the same registered as required by law. This was done in January, 1867.

At the fall term, 1868, of said Barbour circuit court, said Arrington, as such solicitor as aforesaid, demanded payment of his said claim of the county treasurer of said county, who refused to pay the same, but acknowledged that at the time of said demand he had in his hands, as such treasurer aforesaid, the sum of fifteen dollars of fines and forfeitures in the county treasury of said county, but that said treasurer was holding said sum of fifteen dollars of fines and forfeitures to be paid to one Seth Mabry, in satisfaction of certain witness certificates held and owned by said Mabry, and which fund was claimed by said Mabry for that purpose.

It appears from the statement in the record that Mabry held and owned a State witness certificate for seventeen dollars and fifty cents, which had been duly certified by the clerk of said circuit court of Barbour county as a claim against the said county of Barbour, and duly presented to the treasurer of said county and registered as required by law, in June, 1867. And upon this witness certificate said Mabry claimed the fund of fifteen dollars abovesaid in the hands of said county treasurer.

Upon this state of facts, Arrington applied to the honora-



ble judge of the circuit court of said county of Barbour at the fall term, 1868, for a *mandamus* or other proper process or order to compel the county treasurer, who was then one Van Houton, to pay to him, said Arrington, on his fee aforesaid, said sum of fifteen dollars.

This application on behalf of said Arrington was refused and denied by the court, and the costs of said application were taxed against the said Arrington. To this refusal and judgment of the court below, the said Arrington excepted, and now brings his case into this court, and renews his application here, as upon appeal.

These claims are each required to be presented to the county treasurer, and registered and numbered as prescribed by law. This is required of all claims which are allowed and authorized to be paid by the county treasurer. Rev. Code, § 926, cl. 2, 3. And after they are so presented, registered, and numbered, they become and are allowed claims against the county treasurer, and when there are funds in his hands, out of which they are authorized to be paid, he becomes bound to pay them, as required by law. If he fails to do this, upon demand, he may be sued at law for the same, by notice and motion against him and his securities, and judgment obtained against them in the name of the party to whom the claim is payable, his legal representatives, or assigns, for the amount of the claim.—Rev. Code, §§ 930, 4343, 4222, 4221.

This affords a sufficient remedy at law, without the necessity for resort to the extraordinary remedy of *mandamus*. When this is the case, a *mandamus* will be denied, as there is another specific and sufficient remedy provided by law.—*Tarver v. Commissioners Court of Tallapoosa County*, 17 Ala. 527; *Ex parte Robins*, 29 Ala. 71; *Shep. Dig.* p. 696.

Let the judgment of the court below be affirmed, and the application in this court be denied. And the said Arrington will pay the costs in this court and in the court below.

TALLADEGA INSURANCE COMPANY *vs.* WOODWARD.

[ACTION ON CERTIFICATE OF DEPOSIT.]

1. *Service of process ; who may lawfully accept.*—In a suit against a corporation, any officer, agent or employee thereof, on whom the summons and complaint may be executed, is competent to accept the service.
2. *Service of process, acceptance of ; what not evidence of.*—An acceptance of service by one secretary of the corporation, is not of itself sufficient evidence that he bears that relation to the corporation.
3. *Judgment entry, recital that "service was proven to satisfaction of the court ;" how construed.*—A recital in the judgment entry that "service was proven to the satisfaction of the court," will be intended to mean that one who accepted service as secretary of a corporation, was shown by the proof to have been such secretary, in order to sustain the judgment.
4. *Certificate of deposit ; judgment by default, without intervention of jury, may be rendered on.*—A certificate of deposit is an instrument in writing ascertaining the plaintiff's demand, upon which a judgment by default may be entered up by the clerk, without the intervention of a jury.

APPEAL from the Circuit Court of Talladega.

Tried before Hon. JOHN HENDERSON.

The opinion contains the facts.

JOHN T. HEFLIN, for appellant.

J. A. WOODWARD, *pro se*.

B. F. SAFFOLD, J.—This suit was brought by the appellee against the appellant. The plaintiff claimed of the defendant a specified sum of money as due on a writing as follows: "\$3,900. Talladega Insurance Company, Talladega, Alabama, January 13, 1862. Mr. James A. Woodward has deposited in this office, with interest, thirty-nine hundred dollars to the credit of himself, payable on the return of this certificate, properly endorsed. James G. L. Huey, secretary."

The service of the summons was effected thus: "The defendant, its secretary and managing agent, hereby acknowledges legal service of the within summons and complaint, and waives copy; also waives entry on appearance docket at spring term, 1866. April 17, 1866. James G. L. Huey, secretary." The judgment was by default, and recites that service was "proven to the satisfaction of the court."

The objections of the appellant may be embraced in two propositions: 1. The record does not show service of process on the defendant. 2. The cause of action did not authorize a judgment by default and without a writ of inquiry.

When process against a corporation is executed by the sheriff on one of its officers or agents, proof is necessary that the person served is an officer or agent upon whom it may be served.—*Cole v. Wetumpka and C. R. R. Co.*, 6 Ala. 655; *Lyon v. Lorant*, 3 Ala. 151. A summons to a corporation may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier or managing agent thereof.—Revised Code, § 2568. Acceptance of service of summons is usually an acknowledgment in writing of notice of the suit, and of the delivery of a copy of the summons and complaint. Can the president or other officer or agent above mentioned accept service? The service upon him, though on account of his connection with the corporation, is, nevertheless, a personal act. It is notice to an individual of a proceeding against the body he represents, and his acceptance of service is nothing more than his declaration in writing that he has received such notice. Any one on whom service may be executed, may acknowledge that he has been served.

The proof of service, which was satisfactory to the court, must be held to include the facts that Huey signed the acceptance of service found on the summons and complaint, and that he professed to do so as the secretary of the corporation. That he was the secretary must be shown. Did this profession of his amount to such a showing? The act of Huey in accepting service was not performed as the



agent of the company. He may have been without authority from it to do so, as would be almost invariably the employee, who may be served when the officers named are unknown or reside out of the State.—Revised Code, § 2569. Huey would undoubtedly be a competent witness to prove his agency.—Revised Code, § 2704. But his mere declaration that he was the secretary, not made at the time of transacting the business of his agency, and, perhaps, not within the scope of his authority, cannot be received to bind his principal.—*Williams v. Fitzpatrick, Governor*, 20 Ala. 791. The recital in the judgment entry that service was proven to the satisfaction of the court must, however, be construed to mean that evidence was introduced tending to show that Huey was the secretary of the company. It was the duty of the circuit court to have required such proof as was legal, and so much as was necessary, and we must suppose that the requisition was made. Every intendment must be made in favor of the judgment of a subordinate court which can consistently be made.—*Norwood & Chambers v. Riddle*, 1 Ala. 195; *Earbee et al. v. Ware*, 9 Port. 291. The like presumption must be indulged in reference to the entry of the case on the appearance docket. Such a supposition is only negatived by the waiver made by Huey on the summons.

The first count of the complaint is a special one, upon what may properly be termed a certificate of deposit bearing interest. It is upon a written instrument, the foundation of the suit, purporting to be signed by the defendant's agent, and must be received in evidence without proof of the execution, unless the execution thereof is denied by affidavit.—Rev. Code, § 2682. It ascertains the plaintiff's demand, and the judgment by default may be entered up by the clerk without the intervention of the jury.—Rev. Code, § 2770; *Ib.* p. 678, (form of plea of *non est factum*); *Alabama Coal Mining Company v. Brainard*, 35 Ala. 476. It was, in effect, a promissory note, payable on demand, and the commencement of the suit was a sufficient demand.—Story on Promissory Notes, §§ 29, 12. The requirement that the writing was to be returned properly

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Albritton, Guardian, v. Canterberry et al.

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endorsed amounted to nothing, while it remained in the hands of the original holder.

The authority of this company to receive money on deposit was determined in the case of *Talladega Insurance Company v. Landers*, January term, 1869.

The judgment is affirmed.

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### ALBRITTON, GUARDIAN, vs. CANTERBERRY ET AL.

[APPEAL FROM ORDER OF CIRCUIT COURT, ANNULING AND SETTING ASIDE  
A JUDGMENT RENDERED AT A FORMER TERM THEREOF AND TAXING PLAINTIFF WITH COSTS.]

1. *Appeal; what such final judgment as will authorize.*—An order of the circuit court setting aside and annulling a judgment rendered by it at a previous term, and taxing the plaintiff with costs, is such a final judgment as will authorize an appeal to this court.

APPEAL from the Circuit Court of Lowndes.

Tried before Hon. J. Q. Smith.

Facts are sufficiently stated in the opinion.

COX, WITCHER & RUGELEY, for appellant.

JAMES BUELL, *contra*.

PECK, C. J.—The order and judgment of the court below, setting aside and annulling the judgment of said court, rendered at a previous term thereof, in favor of the appellant, guardian, &c., against said appellees, and taxing her with the costs, is a final judgment, upon which an appeal can be properly taken to this court.

The said order and judgment is reversed, on the authority of the case of *McElvain et al. v. William Mudd, Adm'r*, decided at this term, declaring the 3d section of the ordinance of the convention of this State, No. 38, passed the 6th day of December, 1867, unconstitutional and void.

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Clark, Adm'r, v. Washington.

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The cause is remanded to the court below, with directions to set aside and vacate said order and judgment, so rendered by said court, setting aside and annulling the said judgment rendered in favor of said appellant, guardian, &c., as aforesaid.

The appellees will pay the costs of this court and of the court below.

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CLARK, ADM'R, vs. WASHINGTON.

[ALLOWANCE OF CLAIM AGAINST INSOLVENT ESTATE.]

1. *Statute of non-claim, answer to plea of; when bad on demurrer.*—The answer to a plea of the statute of non-claim, which discloses the fact that a claim or debt against an insolvent estate was not presented to the representative of such estate, within eighteen months after the grant of letters testamentary or of administration on said estate, is bad on demurrer.—(PECK, C. J. dissenting, and holding, that in this case the facts relied on, as a replication to the plea of statute of non-claim, were tantamount either to an actual presentment of the claim, or to a waiver thereof, or to an excuse for not presenting the same.)
2. *Claim, presentation of; when may be inferred by jury.*—Nevertheless, upon an issue properly made before a jury, the facts relied on, as a replication in this case, may warrant a finding of a proper presentation of the claim.

APPEAL from the Probate Court of Greene.  
Tried before Hon. WM. MILLER.

The material facts of the case are as fully set out in the opinion of the court, and in the dissenting opinion of the chief justice, as they can be gathered from a rather defective record.

MORGAN & JOLLY, for appellant.  
W. P. WEBB, contra.



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Clark, Adm'r, v. Washington.

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PETERS, J.—The record in this case is very defective in the statement of the facts on which the court acted. The controversy which is sent here for review and correction arose on the application of Mrs. Washington, in the probate court of Greene county, in this State, to have a claim allowed in her favor against the estate of Samuel F. Hale, deceased, for \$5,550 00. The estate of Hale had been declared insolvent, and Clark, the administrator *de bonis non* of that estate, objected to the allowance of Mrs. Washington's claim, for several reasons—one of which was, that it had not been presented as required by law, within eighteen months after the grant of letters testamentary or of administration on Hale's estate, and that it was consequently barred by the statute of non-claim.

The mode of proceeding adopted by the parties to the controversy, in the probate court, was a statement of the cause of action against the estate of Hale as upon a complaint in an action at law, filed in the name of Mrs. Washington. To this, the representative of Hale's estate pleaded several pleas in objection to the allowance of the claim insisted on, as in an action at law, and the claimant replied and the representative rejoined until an issue in fact or in law was reached. A jury was waived and the issues were tried by the court alone. The decision of the court was in favor of Mrs. Washington, and the claim was ordered, by the court of probate, to be allowed. To this decision and judgment of the court the administrator of Hale's estate excepted, and tendered his bill of exceptions, reserving his objections, which was dated and signed by the judge presiding, and made a part of the record. From this order of allowance the controversy is brought, by appeal, to this court, by the administrator of the estate of Hale.

The claim here sought to be charged against the estate of Samuel F. Hale, deceased, was founded on a bill of exchange, on which the deceased was an acceptor. There were three pleas filed in objection to its allowance. Mrs. Washington asserted that she was the owner of the bill of exchange, and the claim for its allowance was set up in her favor.

The first plea insisted on the bar of the statute of non-

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claim, for want of proper presentation, within eighteen months after grant of administration, and the second plea was to the same effect; but in it, it was insisted that the claim had not been filed as required by law, so as to remove the bar of the statute of non-claim. Both these objections might have been included in the same plea. The third plea will not be noticed in this opinion, as the evidence on which the court acted seems to have been left very uncertain, in the bill of exceptions, and its discussion is not necessary to dispose of the case.

To the first and second pleas there was a replication, which insisted on the fact that Mrs. Hale, who was the administratrix-in-chief of her husband's estate, (said Samuel F. Hale, deceased,) had, in July, 1863, given Mrs. Washington written notice to sue another party in the bill of exchange, in which notice there was an exact description of the bill and all its particulars—possibly a copy, though this is not certain. In this replication it appears that Mrs. Hale had been appointed administratrix of her husband's estate on the seventeenth day of September, 1861. It also appears in the pleadings that the bill of exchange fell due on the first of March, 1862, and that it had been duly protested, and notice thereof properly given to all the parties to it; and it is insisted that this notice to Mrs. Washington was a waiver of presentation, and the filing of said claim as required by the statute, so as to obviate the bar of non-claim, thus interposed.

To the replication thus pleaded the administrator of Hale demurred, and the demurrer was overruled by the court. In this the court erred. The demurrer should have been sustained. The replication did not show an actual presentation of the claim in controversy to the administrator of the estate of said Hale, within the time required by law, nor any sufficient excuse for the same. Less than this was not sufficient to remove the bar of the statute.

There must be an actual presentation of the claim within the statutory limit, or it must be filed in lieu of presentation, as required by law, (Rev. Code, §§ 2239, 2241,) or this must be waived.

In *Pippin, use, &c., v. Hewlett, Adm'r*, Chief Justice

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Dargan lays down the rule, which has ever since been followed by this court. He says : " It is too well settled by the decisions of this court to be now controverted, that the mere knowledge on the part of an executor or administrator of the existence of a claim or debt against the estate he represents is not sufficient to supersede the necessity of presentation of the claim to him."—17 Ala. 291, 293. We feel no inclination to depart from this construction ; and governed by it, the replication in this case was bad, and should have been overturned on demurrer.

It may, nevertheless, be observed that upon an issue properly formed, the facts here relied on as a replication may furnish sufficient proof to a jury to sustain a finding in favor of a proper presentation of the claim, arising on the bill of exchange in a new trial.—*Harrison's Adm'r v. Jones' Adm'r*, 33 Ala. 258 ; *Frazier's Ex'rs v. Praytor*, 36 Ala. 691.

The judgment of the probate court is therefore reversed, and the cause is remanded for a new trial, that right and justice may be done.

Mrs. Washington will pay the costs of this appeal in this court and the court below.

PECK, C. J., (*dissenting.*)—I feel constrained to dissent from the decision of the majority of the court, just announced in this case.

I admit, a mere knowledge of a claim by an administrator is not sufficient to excuse the creditor from presenting his claim within the time prescribed by the statute ; but, in this case, there was much more than a mere knowledge of the existence of the claim. The administratrix not only knew of the claim, but she also knew all about it. She knew the nature, character, and even the very form and amount of the claim, and when due and payable ; but she insisted, her deceased husband was a mere accommodation acceptor—a mere security ; and with all this knowledge, she gave written notice to the holder and owner of the claim, Mrs. Washington, unless she sued the real debtor, a Mr. Ridgway, to the next succeeding court, she would not hold the estate of her said husband bound to pay it.



What good would a *formal* presentment of the claim have done, after all this? It would have given her no information that she did not already have. But, let us suppose, after this notice was given to Mrs. Washington, she had gone to Mrs. Hale, the administratrix, and made an actual formal presentment of the claim, what, most probably, would have taken place between these two ladies? Mrs. Hale, most likely, would have said, in substance, Mrs. Washington, you might have saved yourself all this trouble; I know all about your claim, and did I not tell you, by my notice, I would not pay it, unless you sued Mr. Ridgway to the first court? Did you suppose I was not in earnest in this thing? After such an interview, they would hardly have separated with their good opinion of each other much increased.

The law never requires a vain thing to be done.

For these reasons, and others that might be given, I hold the statements in the first replication to the third plea, are tantamount to either an actual presentment of the claim, or a waiver of such presentment, or an excuse for not presenting the same. Therefore, I think, the demurrer to said replication was properly overruled, and that the judgment of the probate court should be affirmed.

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### BRAY & BROS. vs. LAIRD ET AL.

[APPEAL FROM ORDER DISMISSING LEVY OF ATTACHMENT.]

1. *Exempt property, right of debtor to select; what not impaired by.*—Under the State constitution, the right of a debtor to select the property which he will retain as exempted from execution, can not be impaired by the levy of an attachment or execution upon any portion of it, nor by his omission or refusal to tender other property in lieu of that levied on, nor, in this case, by the fact that the debtor had other personal property of greater value than the amount exempted. (PECK, C. J., *dissenting.*)

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Bray & Bros. v. Laird et al.

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2. *Appeal; what not such final order as will authorize.*—Dismissing the levy of an attachment, is not such a final order as will authorize an appeal to this court.

APPEAL from the Circuit Court of Barbour.

TRIED before H. D. CLAYTON, Esq., an attorney of the court, under § 758 of Revised Code.

The facts are sufficiently set out in the opinion.

F. M. WOOD, for appellants.

JNO. GILL SHORTER, *contra*.

B. F. SAFFOLD, J.—An attachment was issued at the instance of the appellants against the appellees, and levied on some household furniture. The defendants moved to quash the levy, and dissolve the attachment, on the ground that the property levied on was exempt from levy and sale. In support of the motion, the defendants proved that they were husband and wife, and that, a few hours after the levy, they claimed the property, under oath, as exempt under the statute. They also claimed it under the provisions of the State constitution, the debt having been contracted since it became operative. The plaintiff proved, and it was admitted, that Mrs. Laird had other personal property, in excess of the amount protected by the constitution or the statute, but the property levied on was not worth so much. The court dismissed the levy, to which the plaintiff excepted.

In *Ross v. Hannah*, 18 Ala. 125, it was decided that, under the statute exempting certain articles from execution, the debtor had a right to elect which he would retain, and that this right was not divested by the mere levy of an execution on some of the property, even without his tendering to the officer those which he had omitted to seize under the execution. If, however, after the levy, and before the sale, the debtor should put the articles not levied on out of the officer's way, this would amount to an election to retain them, and determine the right.

Under the constitution, \$1,000 worth of the personal property of any resident of this State, to be selected by

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such resident, is exempted from sale on execution, or other final process of any court, issued for the collection of any debt contracted after its adoption.—Const. Art. 14, § 1. The right of selection is thus placed beyond the reach of legislation or judicial restraint before the sale. Whether the legislature can impose on him an obligation, to tender other property in lieu of that levied on, or deny that he had more than the amount exempted, or not, it is sufficient for our inquiry that it has not done so. We, therefore, decide that the right of the defendants to elect what property they would retain, was not affected by the fact that they had other personal property of greater value than the amount exempted, and, also, that they were not bound to tender other property in lieu of that levied on. The dismissal of the levy of the attachment, however, was not such a final judgment as will support an appeal to this court.—*Woodruff v. Rose*, June term, 1869. The appeal is dismissed.

PECK, C. J., concurred in the dismissal of the appeal, but dissented from the construction, by the majority of the court, of the exemption laws as found in the constitution and the statutes.

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### ABRAMS, SURVIVING PARTNER, vs. SEALE, ADM'R.

[ACTION AGAINST WAREHOUSEMEN FOR FAILURE TO DELIVER COTTON.]

1. *Estoppel; when set up, what proper inquiry for jury.*—In a suit against warehousemen on cotton receipts for the non-delivery of cotton, the defendant's witnesses testified that the plaintiff, in the presence and hearing of the defendant, declared that he had sold his cotton, a part of which had already been deposited at the warehouse, to another person who was present, and who immediately directed the manager of the warehouse, in the presence and hearing of the plaintiff and defendant, to ship the cotton to his order as he received it, which was accordingly done,—*Held*, that a charge to the jury, that if these facts occurred



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after the receipts were given for the cotton, the verdict should be for the defendant, but nothing which transpired before could bar the plaintiff's action, was erroneous, and that the proper inquiry for the jury was, whether the declarations and conduct of the plaintiff, under the circumstances, were calculated to, and did, mislead the defendant.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. P. O. HARPER.

This was an action commenced by Ward, against J. R. & H. S. Abrams, as warehousemen, to recover damages for the failure to deliver seven bales of cotton stored with them on the 12th and 14th of March, 1866. During the pendency of the suit, Ward having died, his administrator was made party plaintiff, and H. S. Abrams having also died, the suit proceeded against J. R. Abrams as surviving partner.

On the trial, as appears from the bill of exceptions, there was a demurrer to the complaint, which was overruled, but as the bill of exceptions does not say that the action of the court was excepted to, it is not noticed in the opinion, and is unnecessary to be here set out. The plaintiff also proved the storing of the cotton, a demand for, and a failure to deliver, the same, and there rested his case.

The defendant then proved by J. M. Jennings, the clerk and manager of the warehouse during the year 1866, that the cotton about which the suit was brought was the last of thirty-three bales of cotton stored by plaintiff with defendant, at different times and in separate lots, during the year 1866; that after some of said cotton was received, but before the seven bales were stored in the warehouse, the plaintiff, together with the defendant, and one Green and witness, were all together at the warehouse, in February, 1866, when plaintiff, in the presence and hearing of defendant and witness, and Green, stated that he had sold his thirty-three bales of cotton to Green, and thereupon said Green, in the presence and hearing of plaintiff and defendant and witness, directed witness to ship said cotton to his commission merchant in Mobile, which was accordingly done as fast as the cotton was received at the warehouse; that plaintiff was present on one occasion when

some of said cotton was being shipped to Green, and saw it, and made no objection, nor as far as witness knew did he make any objection until months afterwards.

Verdery, a witness for defendant, testified, in substance, that he bought the cotton from Ward, as Green's agent, and directed its shipment as delivered at the warehouse; that Ward had notice of this, and did not object, but consented to wait for a short time for the balance of the purchase-money due on the cotton. The receipts for the seven bales of cotton were delivered to Ward at the time of delivery of the cotton, for a voucher with which to settle with Green.

The plaintiff then introduced one Yeldell, and offered to prove by him the contents of a written contract between Green and Ward, in relation to the sale of the cotton, wherein it was stipulated that the cotton should only be shipped as paid for, and the receipts for the cotton to be left with Ward's agent in Greenville. This witness testified, that the contract was executed in duplicate, that one copy was left by Ward with witness, and had been lost or destroyed, and Green, then out of the State, had the other. Upon this predicate, the court admitted, against defendant's objection, secondary evidence to prove the contents of the written instrument, as before set out, and defendant excepted. There was no evidence that the defendants or their agents had any notice of said contract or its contents. The plaintiff introduced evidence of the declarations of Green, at a time when the cotton was seized by the United States authorities, to the effect, that it was not his until he paid the purchase-money. It was admitted, that the defendant was not present and did not know of these declarations. The defendant moved the court to exclude this evidence, which the court refused, and defendant excepted. This, with some other testimony as to the value of cotton at the time of demand, &c., not material to the decision of the case, was all the evidence.

The court, among other charges to the jury, charged them "that if the several matters and things testified to by the witnesses for the defendant, occurred after the execution and issue to Ward of the receipts for the seven bales

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of cotton, for the failure to deliver which this action is brought, the verdict ought to be for the defendant; but if the several matters and things testified to by the witnesses for the defendant occurred before the execution and issue of said cotton receipts, then they could not prevent the plaintiff from recovering the value of the cotton mentioned in the receipts, at the time of the demand and failure to deliver, with interest; that nothing which occurred before the execution of the receipts could bar the plaintiff from recovering for the cotton mentioned in them." To this charge, defendants excepted. The court then gave other charges, not excepted to, and not necessary to be set out, after which it again repeated the charge before set out, and defendants again excepted.

The errors assigned are, that the court erred—

1. In overruling the demurrer to the complaint.
2. In giving the charge excepted to.
3. In allowing the contract between Ward and Green to be proved by secondary evidence, before properly proving the loss of the original.
4. In admitting the declarations of Green as to the ownership of the property, at Powell's office.

RICE, SEMPLE & GOLDTHWAITE, for appellant.

HERBERT, POWELL & BUELL, and WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—The bill of exceptions does not say that the overruling of the demurrer to the complaint was excepted to. We will, therefore, not consider that point.

The important question in the case is the propriety of that charge of the court to which exception was taken.

The plaintiff, Ward, the intestate of the appellee, sued the defendant for damages for the non-delivery of seven bales of cotton, stored at his warehouse on the 12th and 14th of March, 1866. Jennings, a witness for the defendant, testified that about the middle of February, 1866, the defendant, Ward, Green, and himself, were at the warehouse of the defendant together, when Ward stated, in the presence and hearing of the others, that he had sold his



thirty-three bales of cotton to Green, and thereupon, immediately, Green, in the presence and hearing of the defendant and Ward, directed him, witness, who was the manager of the warehouse, to ship said lot of thirty-three bales of cotton, as delivered, to Mobile; that a portion of this cotton was in the warehouse at the time, and the remainder, including the cotton sued for, was brought there afterwards; that, under the above direction of Green, he shipped all of the cotton to Mobile, without any notice or objection from Ward. The defendant testified that while the shipment of some of the cotton was being made Ward was present, and saw it, and made no objection to it, and that he had no notice of any objection until several months after all of the cotton had been shipped.

Verdery, a witness for the defendant, testified that he, as agent of Green, bought this cotton from Ward, and directed its shipment as delivered at the warehouse; that Ward had notice of it and did not object, but consented to wait for a short time for the balance of the purchase money. The defendant had given to Ward receipts for the cotton, the breach of which, as a contract, is the cause of this action.

Upon this evidence, mainly, the court charged the jury, that if the several matters and things testified to by the witnesses, for the defendant, occurred after the execution and delivery to Ward of the two cotton receipts, on the 12th and 14th of March, 1866, the verdict ought to be for the defendant, but if before, it ought to be for the plaintiff; that nothing which occurred before the execution of the receipts could bar the plaintiff's right of recovery.

This charge, given first and repeated after others had been given, confined the jury to the single inquiry whether the facts testified to by the defendant's witnesses occurred before or after the delivery of the two receipts. It declared the sufficiency of the testimony to sustain the defense, if afterwards, but nothing occurring before could defeat the complaint.

In this there was error. It matters not what contract had been made between Ward and Green. If Ward's declaration, under the circumstances of its making, was

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calculated to mislead the defendant, and did mislead him as to his duty respecting the cotton, whether made before or after the receipts were given, it was his own misfortune, and ought not to be visited on the defendant. This was the inquiry for the jury, under proper instructions from the court. The giving of the receipts to Ward was not inconsistent with the sale of the cotton by Ward to Green; Ward needed them to prove his delivery of the cotton, and to settle with Green. If Ward's conversation was addressed to the defendant or his agent, or intended to be heard by them, and he heard Green direct the agent to ship the cotton to Mobile as it was delivered, without objection either at the time or before the shipment, he has no ground of action. But if it was incidental and not addressed to them particularly, nor calculated to influence them, or did not mislead them, the defendant would be liable.

The loss of the written contract between Ward and Green was sufficiently shown to admit secondary evidence of its contents.—*Sturdevant v. Gaines*, 5 Ala. 435; *Jones v. Scott*, 2 Ala. 58.

The judgment is reversed and the cause remanded.

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### KITCHELL, ADM'R, vs. JACKSON, ET AL., ADM'RS.

[CONTEST IN PROBATE COURT ON CONFIRMATION OF SALE OF REAL ESTATE OF DECEDENT FOR DISTRIBUTION.]

1. *Sale of lands by administrator; when will be vacated.*—A sale of lands by an administrator for distribution, under an order of the probate court, by which the administrator was authorized to sell the lands for CASH, and which sale was made on 1st February, 1865, and the lands bid off for \$18,120.00, and paid for in Confederate treasury notes, will be vacated on application to have the sale confirmed, when it appears that the lands sold, at the time of the sale, were worth \$8,000 in gold, and the Confederate currency thus paid for it by the purchaser, was not worth much over \$346.00.
2. *Cash; meaning of, as used in the statute.*—The word cash, in such an

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order, and in the statute, means a legal tender currency or its equivalent.

APPEAL from Probate Court of Marengo.

TRIED before Hon. THOS. J. WOOLF.

The facts upon which the opinion of the court is based are sufficiently set out therein.

FERRELL & WATTS, for appellants.

RICE, SEMPLE & GOLDTHWAITE, for appellee.

PETERS, J.—This case arose on an application for the sale of lands by an administrator for distribution. The proceedings were commenced by petition in the probate court of Marengo county, on November 8th 1863. The order of court for the sale of the lands mentioned in the petition was granted on the second day of January, 1865, and the sale was required to be made for *cash*. The petition was filed by Charles Irby, "administrator of the estate of James M. Rembert, deceased." The sale was made on the first day of February, 1865, when D. B. Jackson became the purchaser of a portion of said lands for the sum of \$18,120.00. This sum was paid to the administrator, Irby, in Confederate treasury notes at, or immediately after the sale. Irby failed to make report of this sale until the 28th day of August, 1866, when he reported it and asked to have it confirmed. But before this report was made Irby had ceased to be administrator of the estate of said Rembert, and Frank N. Kitchell had been appointed administrator *de bonis non* of said estate, to succeed him.

On the hearing of the report of Irby to confirm the sale to Jackson, Kitchell, as administrator *de bonis non* of Rembert, appeared and contested its confirmation. Thereupon Jackson, the purchaser under the order to sell granted on the petition of Irby, and under the sale made by Irby, appeared in the probate court and was permitted to be made a party to the proceedings, on the report to confirm the sale. This sale, after hearing the matters alleged on both sides, was confirmed by the probate court, at a regu-



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lar term thereof, on April 8th, 1867. To this order of confirmance, and the proceedings which led to it, Kitchell, as administrator, excepted, and now brings the proceedings on the report for confirmation of the sale and the order of the probate court here, for review and correction. There are many objections and exceptions apparent on the face of the record, which this court might re-examine, without bill of exceptions, but this is unnecessary, in the view we take of this cause, as many of them can not again arise in the future progress of the case in the court below. Rev. Code, § 2250.

The statutes authorizing the sale of the lands of a deceased person, for the purpose of division amongst the heirs or devisees, requires such sale to be made for cash or upon a credit, and "confirmed, and titles made to the purchaser on the payment of the purchase money, in all respects as upon a sale of lands by an executor or administrator, under an order of the probate court for payment of debts."—Revised Code, §§ 2228, 2079, 2080, 2090.

Here the order was to sell for *cash*. The purchaser, Jackson, bid for one tract \$17,000.00, and for another tract \$1,120.00 ; making an aggregate of \$18,120.00. This sum, by the terms of the sale, was required to be paid in cash. *Cash*, in the sense used in the statute and in the order of the court authorizing this sale, means money ; that is, such a currency as was good as a legal tender in payment of debts under the constitution and laws of the United States, or such a currency as was convertible into such a legal tender currency, without loss to the estate to which it was paid. It does not mean the "war currency" of the so-called Confederate States.—Index to Rev. Code, p. 891, § 2134. This was not cash, and a payment in it was not a compliance with the terms of this sale.—Const. U. S., Art. 1, § 10.

Upon the contest, to have the sale confirmed, the proofs show that the currency paid for the lands sold was not worth more than \$346 in gold at the time it was paid, and that the lands sold were worth in 1861 and in 1865, and all through the year 1866, as much as \$8,000 in gold ; near

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twenty times as much as was paid for them by Jackson. Such a proceeding ought not to have been confirmed.

The order of the probate court, confirming such sale, was erroneous. It is therefore reversed, and the cause is remanded, with directions to the court below to vacate said sale, made on the first day of February, 1865, by said Irby, administrator of the estate of said James M. Rembert, deceased, to said Jackson, and to proceed in the further administration of said estate in conformity with this opinion and as required by law.

The said Jackson, and said Irby, appellees in this court, will pay the costs of this appeal in this court, and in the court below.

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## CURRY, GARNISHEE, vs. WOODWARD.

[GARNISHMENT OF STOCKHOLDER, FOR UNPAID SUBSCRIPTION TO CAPITAL STOCK OF CORPORATION, ON JUDGMENT.]

1. *Assignment of error ; what, excludes irregularities from consideration.*—An assignment of error “that the court erred in rendering judgment as shown by the record,” without any other assignment, excludes from consideration any mere irregularities in the proceedings.
2. *Garnishee, judgment against ; what must appear to sustain.*—On appeal from a judgment against a garnishee, in order to sustain the judgment below, it must appear that a judgment had been rendered against the principal in the same court. But rather than reverse for such a defect a *certiorari* would be awarded to bring up the record in the principal case.
3. *Garnishee, answer of ; when part of record.*—The answer of a garnishee, appended to the transcript, verified by affidavit and referred to in the judgment entry, is a part of the record.
4. *Capital stock, unpaid subscription for ; what not necessary to sustain judgment against stockholder on garnishment.*—When a subscriber to the capital stock of a corporation is garnished as its debtor, it is not necessary that the stock should have been called for by the company to obtain judgment against him for the amount of his unpaid subscription.

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APPEAL from the Circuit Court of Talladega.

Tried before Hon. JOHN HENDERSON.

The appellee, Woodward, obtained a judgment against the Talladega Insurance Company, at the spring term, 1867, of the Talladega circuit court, and the appellant, as a stockholder in said company, and owing an unpaid subscription to the capital stock of said company, was afterwards summoned by process of garnishment as the debtor of said company. The garnishee filed a sworn answer, which being considered insufficient, judgment was rendered against the garnishee for the amount of the appellee's demand. There was no bill of exceptions, and the only error assigned is, that "the court erred in rendering judgment against the garnishee as shown by the record." The other facts upon which the opinion is based, will be found therein.

JOHN T. HEFLIN, for appellant.

SAM'L F. RICE, for appellee.

B. F. SAFFOLD, J.—The single assignment of error is, that "the court erred in rendering the judgment against the garnishee as shown by the record." This assignment, so general and vague, must exclude from consideration any mere irregularities in the proceedings, and confine our inquiries to the jurisdiction of the court, and such errors, apparent on the record, as should have the effect of annulling the judgment.

It appears from the record, that the appellee recovered a judgment against the Talladega Insurance Company, the defendant in this case, on the 18th of May, 1867.

The garnishment, issued by the clerk of the circuit court of Talladega county, recites, that the judgment was recovered in the court aforesaid, and an execution issued on it, which was returned by the sheriff of Talladega county "no property found." This is a sufficient showing that judgment had been rendered against the principal in the same court before it was given against the garnishee.—*Jackson v. Shipman*, 28 Ala. 488. But if there was a defect in this



particular, this court would award a *certiorari* to bring up the record in the principal case, rather than reverse on that ground.—*Blair v. Rhodes*, 5 Ala. 648.

There is no bill of exceptions, but the answer of the garnishee is appended to the transcript, and is verified and referred to in the judgment entry, and must be considered as part of the record.—*Easton v. Lowery*, 29 Ala. 454; *Fortune v. State Bank*, 4 Ala. 385.

From this answer, it is shown that the garnishee was a subscriber to the capital stock of the insurance company, and that his unpaid stock amounted to more than the demand of the plaintiff. He claims an offset against this indebtedness for money deposited with the company, but the nature of this claim is not so definitely stated as to impress error upon its non-allowance, when no exception was taken in the court below. His claim of offset for dividends can not prevail. Dividends unpaid are assets of the company, and liable for its debts.

It was not necessary to show that the stock had been called for by the company.—Rev. Code, § 2893; *Smoot v. Hart*, 33 Ala. 69.

As the court had jurisdiction of the cause, and the judgment might have been rendered, in the absence of any specified error which could not be corrected in the court below, or which ought to have been there first presented, the judgment must be affirmed.

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## LEWIS ET AL. vs. GRACE.

[ACTION ON PROMISSORY NOTE—BRANCH SUMMONS.]

1. *Branch summons; what not such irregularity in, as will work a discontinuance.*—There being three defendants, L. and B. and H., and H. residing in Jefferson county, and L. and B. residing in Shelby county, suit was brought against all in Jefferson circuit court, and the original summons and complaint was served on H. by the sheriff of Jefferson.

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and a branch summons issued by the clerk of the circuit court of Jefferson county and sent to Shelby county, and there served on L. and B., and all the summonses are returned to Jefferson circuit court and there made one case, and judgment by default rendered against all the defendants,—*Held*, that such judgment will not be reversed on appeal to this court, because the branch summons does not contain the name of the defendant H., except in the indorsement by the clerk on the branch summons. Such an irregularity, if of any force, is not equivalent to a discontinuance.

APPEAL from Circuit Court of Jefferson.

Tried before Hon. W. S. MUDD.

The facts are sufficiently stated in the opinion.

RICE, SEMPLE & GOLDTHWAITE, for appellants.

PORTER & MARTIN, *contra*.

PETERS, J.—On the 31st day of January, 1866, the appellee, Baylis E. Grace, brought suit against Harriet Lewis, Enoch Benson and Richard Hudson, in the circuit court of Jefferson county. This was an action of debt by summons and complaint, founded on a promissory note, dated January 1st, 1862, “due at twelve months, with interest thereon,” and made by said defendants, Lewis, Benson and Hudson, and also signed by John S. Harrell, who was not sued in the action.

After setting out this summons and complaint in full, the record recites—“And on same day, first aforesaid, a branch was also issued to Shelby county in the words and as follows, to-wit :

“The State of Alabama, } To any sheriff of the State  
Jefferson county. } of Alabama. You are hereby commanded to summon Harriet Lewis and Enoch Benson to appear at the next term of the circuit court, to be held for said county, at the place of holding the same, then and there to answer the complaint of Baylis E. Grace.

Witness my hand, this 31st day of January, 1866.

J. M. WARE, Clerk.

“Baylis E. Grace, plaintiff, }  
vs, }  
Harriet Lewis and Enoch }  
Benson, defendants. }

Circuit Court,  
Spring Term, 1866.

“The plaintiff claims of the defendants one thousand

and five dollars (\$1,005), due by promissory note made by them on the 1st January, 1862, and due at twelve months, with interest thereon. Said note is payable to Baylis E. Grace, administrator of the estate of William Wood, deceased, and is now the property of plaintiff, individually. Said note is signed by John S. Harrell as well as said defendants, but said Harrell is not sued herein.

“PORTER & MARTIN,  
“Attorneys for plaintiff.”

The record then further recites—“Upon which is indorsed the following, to-wit: I certify this summons and complaint is a branch of an original suit, issued this day by me, against Harriet Lewis, Enoch Benson and Richard Hudson, in favor of Baylis E. Grace, and returnable to the next term of the circuit court of this county, and that they both constitute but one and the same cause of action.

“J. M. WARE, Clerk.”

“These writs were regularly served, the original by the sheriff of Jefferson county on the defendant, Hudson, and the branch by the sheriff of Shelby county on Mrs. Lewis and Benson, the other parties named as defendants in the original summons and complaint. And at the spring term of the circuit court of Jefferson county, in 1867, judgment was rendered against all the defendants named in the original suit, by default, in favor of the plaintiff, for the sum of one thousand three hundred and forty and 59-100 dollars; the amount of damages claimed in plaintiff's complaint, together with the costs in this behalf expended, for which execution may issue.”

From this judgment the defendants in the court below appeal to this court, and assign the judgment of the circuit court for error. The judgment below is also suspended by supersedeas bond.

The objection here urged to the regularity of the proceedings in the circuit court is to the form of the branch summons sent to Shelby county, and served upon Mrs. Lewis and Benson, the defendants to the original suit, who resided or were found out of the county of Jefferson. This summons does not mention the name of Hudson,



except in the indorsement, the defendant sued in the county of Jefferson, but only the names of Mrs. Lewis and Benson. In all other respects it and the complaint which accompanies it, are exact copies of the summons and complaint filed and issued in the original suit.

The Code requires that in all such cases as this the suit shall be "commenced by the 'service of a summons,' and that this summons must be accompanied by the complaint of the plaintiff, signed by him or his attorney, setting forth the cause of action."—Rev. Code, §§ 2558, 2559, 2636. The same authority requires that freeholders of this State must not be sued out of the county of their permanent residence, except in certain cases, of which this is not one. Rev. Code, § 2562. But when the defendants do not all live in the same county a different rule prevails. It is this: "When any joint, or joint and several, cause of action exists, and the defendants reside or may be found in different counties, a summons may issue from the court having jurisdiction of any one of such defendants, and be executed in any county, which must be returned and filed in the court from which the process issued, and constitute but one suit, in the same manner as if but one summons had issued against all the defendants; and it is the duty of the clerk, on issuing such branch summons, to indorse thereon that it is a branch of the original suit, and that all the summonses constitute one suit and are for one and the same cause of action."—Rev. Code, § 2561.

The promissory note here sued on may be treated in law as the several promise of each of the parties to it.—Rev. Code, § 2539. It therefore brings this case under the control of the rule above cited. This, then, is a suit in which a branch summons may issue. And the only question made in this cause is whether the branch summons issued in this case was such as the law authorizes and requires.

We think there can be no possible rational doubt about this. The Code authorizes the issuance of a "branch summons," and directs how it shall be indorsed, how served and how returned, and how it shall be treated after its return, and what effect shall be given to it. The Code does not limit this branch summons to any particular

form. It does not require that it shall be a copy of the original. It is wholly a statutory proceeding. It is not a proceeding at common law. The court is clothed with an enlarged jurisdiction, but is not confined to one precise form of words by which this new jurisdiction may be exerted. The court, then, must form its own process. This power comes with the jurisdiction. If this process is so formed and so used as to do no injury or injustice to the parties over whom the new jurisdiction is exercised, they have no reason to complain. If they ought not to have been sued out of their county, they ought to have appeared in the court below and made the objection by plea in abatement.—Rev. Code, § 2562. If they ought not to have been sued at all, they ought to have appeared and pleaded their exemption. If the mere process was in any thing irregular and not wholly void, the parties complaining should have appeared in the court below and there sought to have it corrected. They had notice of the demand against them, of the time and place of trial, of the court in which the trial was to be had, and this was done in the manner prescribed by law. A branch summons is certainly not intended to mean a copy of the original, because a branch is always but a part of the whole, the whole is made up of its branches, but a copy is a duplicate of the whole.

We think, then, that the omission of the name of Hudson from the branch summons to Mrs. Lewis and Benson, did not make the summons void. It was sufficient to bring the parties into court. Indeed, we think it was sufficient for a compliance with the requirements of the statute.

The case can not, therefore, be assimilated to a discontinuance. No party that was sued and served with process was dismissed from the suit. The suit proceeded against all that were sued, and judgment was taken against all that were sued. This is not a discontinuance. A discontinuance is an unauthorized dismissal of the suit, as to a party who has been sued and served with process.—1 Bouv. Law Dict. (12th ed.) p. 481; *Fennell v. Masterson*, Adm'r, January term, 1869.

The defect complained of here is one that could have

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Reynolds, Adm'r, v. Kirkland.

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been amended in the court below. It was mere matter of form, and had it been necessary Hudson's name might have been inserted in the branch summons, on motion or upon objection, in the court below.—Rev. Code, §§ 2807 to 2811, inclusive, and cases there cited.

There is no error in the proceedings and judgment in the court below; it is therefore affirmed, with five per cent. damages. The appellant and his securities will pay the costs of this court and in the court below.

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REYNOLDS, ADM'R, vs. KIRKLAND.

[ACTION ON PROMISSORY NOTE.]

1. *Decedent, sale of personal property to pay debts; necessity for, a jurisdictional fact, what allegation sufficient.*—The necessity for a sale of the personal property of a decedent, to pay his debts, is a jurisdictional fact; and an application by an administrator for an order to sell certain described personal property, left by his intestate, which alleges, that in his opinion, a sale of the property is necessary to pay the debts of the intestate, is sufficient to confer jurisdiction upon the probate court.

APPEAL from the Circuit Court of Henry.  
Tried before Hon. J. McCaleb Wiley.

The facts are stated in the opinion.

MARTIN & SAYRE, and CLENDENNIN, for appellant.  
F. M. WOOD, and W. C. OATES, *contra*.

B. F. SAFFOLD, J.—This suit was on a promissory note given by the appellees for a mare sold by the appellant as administrator, under an order of the probate court. The defense was that the sale was void, because the application for the sale of the property was not sufficient to give the court the requisite jurisdiction. The defense was sus-



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Reynolds, Adm'r, v. Kirkland.

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tained by the circuit court in a charge to the jury to find for the defendant, to which the plaintiff excepted.

The petition of the administrator, for the sale, recites, that the intestate left a considerable stock of horses, mules, &c., and, "in his opinion and belief, it will be necessary to sell all of said property for the payment of the debts and liabilities of said deceased." This application was made in 1866, and must be governed by the law existing at that time. Section 1743 of the old Code provides for the sale of any part of the personal property of the decedent for the payment of debts, on the order of court, on the application of the executor or administrator, unless power is conferred by the will to sell such property for that purpose. The requisition of notice of the application, by publication or posting in certain cases, in section 1744, excludes the necessity of it in others. Under the common law, the administrator had the authority to sell the personal property of the intestate by virtue of his office. The statute law has wisely taken away from him this right, and thrown the responsibility on the probate court. Nor can it exercise the power of its own motion. There must be an application by the administrator, under oath, stating the particular necessity for the sale. When this is made, the court has jurisdiction to determine the necessity and to order the sale. In this case, the application was sworn to. It specified that the intestate was possessed of certain described personal property, of a perishable character and expensive to keep, and that, in the opinion of the administrator, it was necessary to sell it for the payment of the debts of the decedent. This was sufficient. The existence of the necessity was to be determined by the order of the court, and the order of sale declares that it was made to appear. This necessity was the jurisdictional fact. If a court of limited jurisdiction is charged with the ascertainment of jurisdictional facts, and its proceedings show that these facts were ascertained, they can not be denied; because making the jurisdiction of the court depend upon a preliminary fact, implies authority to ascertain that fact.—*Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

The judgment is reversed, and the cause remanded.

FREER ET AL. *vs.* COWLES ET AL.

[ACTION OF DETINUE.]

1. *Joint action ; what agreement will not support, in detinue.*—C. and P. being separate and independent creditors of F., in pursuance of a verbal agreement to make common cause in obtaining, by suit or otherwise, what they could out of their debtor F., and to divide the recovery between them in proportion to their respective debts, sued F. jointly, in detinue, to recover specific property mortgaged to P.,—*Held*, that such an agreement would not support a joint action.
2. *Trover and detinue, in action of ; value of property, at what time assessed.* In detinue, as in trover, the jury may assess the value of the property at any time between the demand and the trial.
3. *Damages for detention ; what may be considered, in determining.*—The deterioration of the property from use, in addition to the annual rent or hire, may be considered by the jury in estimating the damages for the detention.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. GEO. GOLDTHWAITE.

The facts are sufficiently stated in the opinion.

ELMORE &amp; GUNTER, for appellant.

WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—This was an action of detinue, by George Cowles and John Powell, against W. H. Freer, for the recovery of certain personal property, mainly household furniture, mortgaged by the defendant to Powell. One of the errors assigned is, that Cowles had no interest in the suit, other than was derived from a verbal agreement between him and Powell, made before the commencement of the suit, in terms as follows: As there were several creditors, and each had a separate mortgage on different property of the defendant, they would work together and secure, by suit or otherwise, all or as much of their debts as practicable, and divide and share ratably, according to the amount of their respective debts, whatever money might

be made or received on either of them. And the court refused to charge the jury that, under such an agreement, Cowles had not an interest which would entitle him to a recovery, and consequently Powell could not recover.

Cowles and Powell were several creditors of Freer, and had separate mortgages on separate articles of property. They could not join in one suit their several causes of action, because the damage as well as the interest was several.—1 Chit. Plead. 64. To maintain detinue, the plaintiff must have a general or special legal property in the goods at the time the action was commenced.—1 Chit. Plead. 122. What interest had Cowles in this property sued for at the commencement of the suit? If any, nothing but the right to receive, by virtue of the agreement, a ratable proportion of what should be recovered from Freer on Powell's claim, on paying a like proportion of the expenses of the litigation. The agreement was one to sue Freer at their joint expense on Powell's demand, and divide the recovery. Such an interest will not support a joint action by them.

There was no error in admitting evidence of the value of the property at the commencement of the suit. In detinue, as in trover, the jury may assess the value of the property at any time between the demand and the trial.—*Johnson v. Marshall*, 34 Ala. 522.

The deterioration by use, was an element of damage, in addition to the annual rent or hire of the property.

The judgment is reversed, and the cause is remanded.

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## YONGE vs. SHEPPERD.

[ BILL IN EQUITY TO ENJOIN SALE UNDER MORTGAGE. ]

1. *Injunction ; when will be dissolved.*—An injunction to restrain the collection of a judgment at law, will be dissolved upon the coming in of the answer of a sole defendant, which denies the allegations of the bill upon which its equity rests.



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Yonge v. Shepperd.

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2. *Same; what complainant must offer.*—A party who asks an injunction to restrain the collection of a judgment, or of an ascertained and admitted debt, secured by mortgage, must pay or tender payment for what he really owes to the respondent in the bill, or show some sufficient cause for his failure to do so.

APPEAL from the Chancery Court of Lee.

Heard before Hon. B. B. McCRAW.

The opinion contains the facts.

HOOPER & RICE, for appellant.

J. A. LEWIS, *contra*.

PETERS, J.—This is an appeal from an order of the chancellor dissolving an injunction. After the injunction was dissolved the cause was continued in the court below.

The allegations of the bill show that complainant is indebted to the respondent, by judgment, in the sum of two hundred and eighty-two and 42-100 dollars damages. This judgment was rendered in the circuit court of Russell county, in this State, on the 16th day of August, 1860. On the 23d day of February, 1861, the complainant executed to said respondent, Shepperd, and to Cowdery & Co. a mortgage, by instrument in writing under seal, on a mare and foal, and mortgagor's interest in the Chewacla Lime Works, lying in the county of Russell, now Lee county, in this State, near Opelika, to secure the payment of said judgment to Shepperd, and a judgment to said Cowdery & Co., for the sum of sixty-seven dollars and seventy-two cents. Both these judgments were rendered on the same day and in the same court. It is also alleged that the law day of said mortgage was the first day of August, 1861.

It is also charged that some payments had been made on Shepperd's judgment, but none on that of Cowdery & Co., and that there had been a mistake made in the amount of the note on which Shepperd's judgment had been obtained, of about \$100.00, and that there had been some payments made thereon since. Yonge having failed to pay off the mortgage debts, when the law day of the mortgage arrived, Shepperd, and J. L. Cowdery, as the sur-

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viving partner of Cowdery & Co., proceeded to advertise and sell the property conveyed in the mortgage, according to its terms. And the bill is filed to restrain said sale. Cowdery & Co. are not made parties to the suit in chancery, and Shepperd, the only party defendant, answered the bill and flatly and directly denied all the allegations upon which its equity rested, and demurred to the bill for want of equity.

The bill does not allege that the judgment to Shepperd had been paid, or that there was nothing due thereon, or that complainant was ready and willing to pay any balance that might be due thereon. A party who comes into a chancery court to ask equity must aver his readiness to do equity to the party against whom he complains. If he asks an injunction he must pay, or offer to pay, what he really owes, or show some sufficient excuse for his failure; otherwise his case cannot be sustained.—*Tucker v. Holley*, 20 Ala. 426; *Shep. Dig.* p. 296, § 6, *maxims*; *Williams v. Troy*, 39 Ala. 118.

The injunction was therefore properly dissolved, both on the denials of the answer and the want of equity in the bill.—*Rev. Code*, § 3438; *Cave v. Webb*, 22 Ala. 583; *Norris v. Norris*, 27 Ala. 519; *Saunders v. Cavet*, 38 Ala. 51.

The order dissolving the injunction is affirmed at appellant's cost for this appeal in this court, and in the court below. And the appellant should have leave to amend his bill in the court below as he may be advised.

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### CUNNINGHAM, ADM'R, vs. BEARD, ADM'R.

[SETTLEMENT OF ACCOUNTS IN PROBATE COURT, BETWEEN ADMINISTRATOR OF DECEASED ADMINISTRATOR IN CHIEF AND ADMINISTRATOR DE BONIS NON.]

1. *Stay of execution; when may be ordered.*—When a decree is rendered in the probate court in favor of an administrator *de bonis non* against the administrator of the deceased administrator in chief, there is no

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error in staying execution for six months, for good cause shown, under section 2168 of the Revised Code

2. *Administration, expenses of; rendition of judgment for, when not error.*

A decree may be rendered in favor of the representative of a deceased administrator in chief, against the administrator *de bonis non*, for expenses necessarily incurred in settling the administration of his intestate, under section 2167 of the Revised Code, notwithstanding the latter has obtained a decree for a larger amount against the former.

APPEAL from the Probate Court of Conecuh.

Tried before Hon. A. W. JONES.

The facts are sufficiently set out in the opinion.

JUDGE & BOLLING,\*for appellant.

S. J. CUMMING, and P. D. PAGE, *contra*.

B. F. SAFFOLD, J.—Howard was appointed administrator of Stallworth, deceased. He died before making final settlement of his administration, and Cunningham, the appellant in this case, was appointed administrator *de bonis non*. Beard, the appellee, was appointed administrator of Howard, deceased, and as such, settled Howard's administration of Stallworth's estate. On this settlement, Cunningham, as administrator *de bonis non*, recovered a judgment against Beard, as administrator of Howard, for \$6,861 68, and Beard, in his representative capacity, obtained a decree against Cunningham, in his representative capacity, for \$386 28. Execution on both of these decrees was staid for six months. The decree in favor of Beard was, for expenses incurred in and about the administration of Stallworth's estate, since the death of Howard.

The errors assigned are—1st, the order staying execution on the decree in favor of the appellant; 2d, the decree in favor of the appellee against the appellant.

This settlement was made under the provisions of sections 2165, 2166 and 2167 of the Revised Code. The probate court may stay execution on any decree rendered under the said sections for any time not exceeding six months, if, in the judgment of the court, the interest of the estate requires it.—Rev. Code, § 2168. In this case, the property of Howard's estate had just been offered for sale,



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FOX v. LAWSON, Adm'r.

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and the price bid for it was so inadequate that the court refused to confirm the sale. The reason for the stay was altogether sufficient.

The decree in favor of the appellee was rendered under section 2167, and the question of error is, whether the decree in favor of the appellant ought not simply to have been reduced by the amount of the recovery against him. Stallworth's estate was liable for the expenses of its administration, whether any thing could be obtained on the decree against Howard's estate or not. The decree in favor of the appellee was a judicial ascertainment of the amount, which was necessary to be done. There was no error in rendering it.

The judgment is affirmed.

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### FOX vs. LAWSON, ADM'R.

[CONTEST IN PROBATE COURT ON ALLOWANCE OF CLAIM AGAINST DECEDENT'S ESTATE.]

1. *Statute of limitations ; for what period suspended in this State.*—The statute of limitations was suspended in this State from the 11th day of January, 1861, to the 21st day of September, 1865.
2. *Affidavit made in Mississippi ; what sufficient basis to authorize, on settlement in probate court.*—An affidavit made in the State of Mississippi, before an officer there, authorized to administer such oath, in regard to the correctness and justice of a claim against a decedent's estate in this State, is a sufficient basis to support an amended affidavit in support of such claim, upon the settlement of an insolvent estate in a court of probate in this State.

APPEAL from the Probate Court of Perry.

Tried before Hon. B. S. WILLIAMS.

This was a proceeding in the probate court of Perry county on the settlement and distribution of an insolvent estate.

The appellant, Fox, preferred a claim against the estate of Osmond T. Jones, deceased. The claim consisted of a promissory note, in the following words :

"\$540. On or before the first day of March next, I promise to pay unto N. J. Fox the sum of five hundred and forty dollars, with interest thereon from the first day of this month, for value received. March 25th, 1859.

"OSMOND T. JONES."

The estate of Jones was declared insolvent on the 25th day of February, 1868.

It was objected to the allowance of this claim against said estate : "1st. That said note was barred by the statute of limitations of six years. 2d. That there is no affidavit accompanying the claim. 3d. Because said claim was not proved before any officer authorized to administer an oath to the claimant, of the justice of said claim, without the State of Alabama."

These were all the objections urged against the allowance of said claim in the court below. On the hearing, the probate court refused to allow said claim, and gave judgment against the claimant, said Fox. From this judgment he appeals to this court.

On the trial below, it appeared that the note fell due on the first day of March, 1860 ; and that it was presented to the administrator *de bonis non* of the estate of Jones, on September 27th, 1866, and on the 24th day of November, 1868, it was filed in the probate court of Perry county, Alabama, by said Fox, as a claim against the estate of said Jones, verified by the oath of the claimant, which was in writing as follows :

"The State of Mississippi, } Personally appeared be-  
Winston county. } fore me, J. R. Bozeman,  
clerk of the probate court of said county, N. J. Fox, who,  
being duly sworn, deposed and said that the foregoing an-  
nexed note for the sum [of ] five hundred and forty dollars  
against the estate of Osmond T. Jones, deceased, is, just,  
correct, and true as stated ; that no part of the same has  
been paid, nor any security or other satisfaction received  
thereon.

N. J. Fox."

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Fox v. Lawson, Adm'r.

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This affidavit was sworn to on the 3d day of May, 1866, and was filed in said probate court of Perry county, along with said note, to which it was attached.

On the first day of April, 1869, before the final hearing upon said claim, in said probate court, said claimant, said Fox, made and filed with said claim an amended affidavit, in further support of said claim, in the following words :

"The State of Alabama, } Came personally before  
Perry county. } me, B. S. Williams, judge  
of the probate court of Perry county, Alabama, N. J. Fox, who, by way of amendment to his original affidavit, hereto attached, after being duly sworn, says that he is the owner of the promissory note hereto attached, made by Osmond T. Jones on the 25th day of March, 1859, payable to affiant on the first day of March next, for the sum of five hundred and forty dollars, with interest thereon from March 1st, 1859; that he knows the correctness of said claim, and that the same is just, due and unpaid, and that no portion of the same has ever been paid.

"N. J. Fox.

"Sworn and subscribed before me, April 12th, 1869. B. S. Williams, judge of probate."

Fox also offered, in further support of his claim, a third affidavit, which bore date of the 3d day of April, 1869, and was sworn to before Charles B. Ames, judge of the probate court of Noxubee county, Mississippi, in which it was stated that said probate court of Noxubee county, aforesaid, was a court of record. This later affidavit was made by Fox, and alleged the correctness of said claim, and that it was due and unpaid, as required by the laws of this State.

It was also admitted by the administrator of the estate of Jones, that said "J. R. Bozeman and W. H. Hudson were, at the time of making the first affidavit, clerk and deputy clerk of the probate court of Winston county, State of Mississippi, elected, qualified and appointed as required by law of said State;" and that the "laws of Mississippi authorized the clerk and deputy clerk of the probate court of that State to administer oaths, and certify thereto, the



same as any other officers of said State ;" and that said Fox resided in the State of Mississippi from the making of said note to the time of the trial of this cause in the court below. There was no objection to any of the testimony introduced on the trial in the probate court.

PETTUS & DAWSON, for appellant.

W. L. BRAGG, *contra*.

PETERS, J., (after stating facts as above.)—The first objection to the note was untenable. It was not barred by the statute of limitations. The note became due on the first day of March, 1860. In *Coleman v. Holmes*, decided at the present term, it has been settled that the time elapsing between the 11th day of January, 1861, and the 21st day of September, 1865, is to be deducted from the period necessary to constitute a bar. The statute of limitation in this case requires a lapse of six years, from the falling due of the note, before the bar is perfected. The period above mentioned being deducted, the time elapsed is less than six years. This defeats the bar. —Rev. Code, §§ 2898, 2901 ; *Coleman v. Holmes*, January term, 1870.

The second and third objections are not well taken. The first affidavit made in the State of Mississippi was sufficient, as a basis for the amended affidavit made before the judge of probate of Perry county, in this State, before the final decree. The latter affidavit complied with all the essential requirements of the statute, and it was sufficient. Rev. Code, §§ 2196, 2198 ; *Norvill v. Williams*, Adm'r, 35 Ala. 551 ; *Lay v. Clark's Adm'r*, 31 Ala. 409.

The court below, therefore, erred in refusing to allow the claim of the appellant, Fox, and that decree is reversed, and the cause is remanded, with instructions to the court below to proceed in the further adjudication of the matters involved in this suit, in conformity with this opinion, according to law.

The appellee, as administrator *de bonis non* of the estate of Osmond T. Jones, deceased, will pay the costs of this appeal in this court and the court below.

## BRAZELTON ET AL. vs. McMURRAY.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note; what constitutes, although accepted by a third person.*—  
An instrument which is in the form of a note, but which, in addition, is addressed to a third person, who accepts it, is a promissory note, and may be so declared on.

APPEAL from Circuit Court of Perry.

Tried before Hon. B. L. WHELAN.

This suit was upon an instrument of which the following is a copy :

“MARION, 1st January, 1862.

“\$943 80. Twelve months after date, I promise to pay to the order of James McMurray, nine hundred and forty-three and 80-100 dollars, value received, payable at the office of E. A. Blunt, Marion, Perry county, Alabama, and charge to your obedient servant,

A. J. BRAZELTON,  
JAMES SCOTT.

“To W. M. CATLIN, Marion, Alabama.”

This was accepted by Catlin, by writing his name across the face of the note.

The complaint contained two counts ; one upon a bill of exchange, and another upon a promissory note, substantially in the terms of the forms prescribed in the Revised Code. The defendants were duly served with process, and on their failure to appear, judgment by default was rendered against them. They now assign for error that the instrument declared on was a bill of exchange, and that the complaint did not aver notice of non-payment.

MOORE &amp; LOCKETT, for appellants.

JOHN F. VARY, *contra*.

B. F. SAFFOLD, J.—In the second count of the complaint the appellants were declared against as the makers of a promissory note. Where an instrument is capable of being interpreted either as a bill of exchange, or as a promissory note, the person who receives it may, at his own option, treat it as a bill of exchange, or as a note against the maker. Therefore, an instrument which is in the form of a note, but which, in addition, is addressed to a third person who accepts it, is a promissory note and may be so declared on.—Story on Prom. Notes, § 16; Chit. on Bills, ch. 2, § 2, pp. 28, 29, (8th ed.)

The judgment is affirmed.

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GARRETT ET AL. vs. LYNCH, ADM'R.

[ACTION ON PROMISSORY NOTE—ABATEMENT OF SUIT, ON ACCOUNT OF DEATH, AS TO ONE OF SEVERAL JOINT OBLIGORS SERVED WITH PROCESS.]

1. *Discontinuance; what not equivalent to.*—The death of one of several defendants served with process, in action of debt on a bond or note executed by several persons, and the abatement of the suit as to such deceased defendant, does not discontinue the whole action.
2. *Same; definition of.*—A discontinuance is an *unauthorized* dismissal of the suit as to one of several defendants who have been served with process. The death of one of the defendants, and the abatement of the suit as to him, does not have this effect.
3. *Death of defendant; how suit may proceed after.*—In case of the death of one of the defendants who has been served with process, the court may proceed in the cause, at the proper term, to trial and judgment against the surviving defendants, without further notice of the party who is dead.

APPEAL from Circuit Court of Limestone.  
Tried before Hon. W. B. WOOD.

The opinion contains the facts.



W. H. WALKER, and J. N. MALONE, for appellants.  
HOUSTON & PRIOR, *contra*.

PETERS, J.—This is an appeal from the circuit court of Limestone county. On the 24th day of March, 1866, Darius Lynch, as the administrator of the estate of Thomas Lynch, deceased, brought an action of debt in the circuit court of Limestone county, against Peter F. Garrett, Benjamin B. Peete, and William H. Garrett, by summons and complaint. The complaint shows that the plaintiff claimed of the defendants, the sum of five thousand one hundred and sixty dollars, due by bond executed on the 6th day of December, 1860, and payable twelve months after date of said bond. It is also alleged that said bond was the property of said estate, and assets of said deceased. The summons was properly executed on all the parties defendant on the 28th day of March, 1866.

Afterwards the following judgment was rendered in said circuit court, to-wit:

“And now, afterwards, to-wit, on the 8th day of April, 1867, being a day of the regular term of said circuit court, and the trial term of said cause, came the plaintiff, by his attorneys, and suggests the death of Benjamin B. Peete, and this suit abates as to him; and the other defendants, Peter F. Garrett and William H. Garrett, being solemnly called came not, but made default: It is therefore considered by the court, that the plaintiff recover against said surviving defendants the sum of five thousand, one hundred and sixty dollars debt, in the complaint mentioned, together with the further sum of two thousand, two hundred and one dollars, and seventy-five cents, damages sustained by reason of the detention of said debt, besides the costs in this behalf expended,” &c.

This judgment is brought here on appeal by the defendants, Garretts, for revision on the following errors:

“1st. The appellants in this case assign as error the judgment of the court below.

“2d. That the circuit court erred in rendering judgment by default against appellants, because the action against them had been discontinued.

"3d. By allowing the action to abate as to Benjamin B. Peete, a co-defendant, the whole action was discontinued, and no judgment in that suit could be rendered against appellants."

These assignments of error are based on a statute of this State, found in the Revised Code, which is in the following words, to-wit:

"Suits against joint obligors shall not abate, or be discontinued or dismissed as to any one or more of such obligors, who may die pending the same, but may be revived against the representatives of such deceased obligor or obligors; and the suits may proceed against the survivors of such representatives, but no judgment must be rendered against such representatives until after the lapse of eighteen months from the grant of letters.

"In suits against joint obligors, where one dies pending the suit, judgment may be rendered against the survivors at the trial term, and this suit be continued as to the representatives of the deceased obligor, and the judgments, when rendered, shall be several as to the survivors and the representatives of the deceased, and the satisfaction of one judgment shall be the satisfaction of all the judgments as to principal, interest and damages, except where the same, being against the principal obligor, is or may be assigned by the plaintiff for the benefit of a security under the law of the State, authorizing such assignments of judgments in other cases."—Rev. Code, §§ 2546, 2547; Acts 1866-7, p. 699, §§ 1, 2.

There is no repealing clause in the act above quoted. Then it left the remedies which existed before its passage unaltered, and merely added another remedy to them. The practice, as settled at a very early day in this court, allowed just such a judgment as that rendered in this case. *Harrison v. King*, Minor, 364. Besides, this judgment is in conformity with the second section of the act above cited. Here the suit was against joint obligors, and one of them died pending the suit. In such a case, it is the language of the statute, that judgment may be rendered against the survivors at the trial term. That is just what has been done in this instance.

It was doubtful at common law, whether the death of any of the parties to the suit, either plaintiffs or defendants, did not abate the whole action; and to remove this doubt the 8th and 9th Will. 3, c. 11, § 7, was passed. This enactment permitted the action to proceed in the name of the survivors, whether plaintiffs or defendants, upon a suggestion of the death of the deceased party upon the record. 1 Bac. Abr.; Bouv. 17. This statute was enacted before the declaration of independence, and the separation of the colonies from Great Britain.—1776–77 This was a modification of the common law, which adhered to it and became a part of it, as adopted by our ancestors, in continuing that system, as the law of the land, after the establishment of our government in its present form.—*Patterson v. Winn*, 5 Pet. 241; *Pollard v. Hogan*, 3 How. U. S. 212. This statute was, in substance, at an early day, re-enacted in this State, and this court has, upon several occasions, construed it. And the construction fixed upon it has been, that, where one of several defendants died during the pendency of the suit, the action as to such defendant abated, but was allowed to proceed to judgment against the survivors.—*Rupert & Cassity v. Elston's Ex'r*, 35 Ala. 79, 83. This was the practice until the passage of the act above quoted. This act did not repeal or change the former remedies, but added a new remedy to them. It permitted a revival of the action against the representative of the deceased defendant, and the suit proceeded against him to its final disposition. It was not intended to repeal or embarrass any of the former remedies. They were left as they existed before the enactment of the statute.

The learned counsel for the appellants insist that the practice pursued in this case amounts to a discontinuance at common law. We think otherwise. A discontinuance results from an unauthorized dismissal of a suit against one of several defendants, who has been served with process, and against whom it is competent to proceed without a revival.—*Whitaker v. Van Horn*, January term, 1869, and cases cited. Here the suit could not proceed against the dead defendant, but could only proceed against his representative upon revival. And this revival is optionary with



the plaintiff. He has the remedy existing before this statute. He may permit the suit against the dead defendant to abate, and bring a new action against his representative, or he may revive this suit under the statute. The language of the statute is positive and peremptory in giving the right of revival in this case, but it is permissive in requiring the exercise of the right. It expressly declares that the suit "may be revived against the representatives of the deceased obligor or obligors." It does not require that this right shall be exercised, and that a failure to do so shall defeat the whole action. We do not think that such a construction can logically be drawn from the language of the act, nor from its purpose. Then we can not legitimately conceive it to exist. And without this, the position of the learned counsel for the appellants is not sustained. The judgment itself is sufficiently formal.—Archb. Forms.

It is therefore the judgment of this court, that the judgment of the court below be in all things affirmed.

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### BUSH vs. ROBINSON.

[APPLICATION TO JUDGE OF PROBATE, UNDER PROVISIONS OF THE REVISED CODE, FOR LEAVE TO RAISE DAM TO SUPPLY GRIST MILL TO GRIND FOR TOLL.]

1. *Objection ; what can not be made for first time in this court, by party appearing in court below.*—In a proceeding under the Revised Code, to erect or raise a dam, the objection that less than fifteen days intervened between the filing of the application and the inquest of the jury, can not be raised, for the first time, in this court by a party who appeared in the primary court to contest the application, and there omitted to make the objection.
2. *Facts, existence of ; what sufficient proof of, on appeal.*—When an appeal is taken upon the record merely, without a bill of exceptions, it is sufficient if the existence of a fact, necessary to uphold the judgment of the court below, appear either actually upon the record, or by the determination of the court.

APPEAL from the Probate Court of Crenshaw.

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Bush v. Robinson.

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Tried before Hon. G. W. THAGARD.

Facts are sufficiently stated in the opinion.

GEORGE W. STONE, for appellant.

WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—The appellee, Robinson, on the 15th of March, 1869, filed an application to the judge of the probate court for permission to increase the height of his mill-dam, which supplied water to a grist-mill that ground for toll. On the same day, an order was issued by the judge to the sheriff to summon seven disinterested freeholders of the county, to meet at the place where the dam was to be erected, on the 29th of March, 1869, to inquire touching the matters contained in the application. The jury and the sheriff met together at the time and place appointed, and both made returns to the judge of how they had performed their duties. Ten days notice was next given to the appellant, Bush, to appear before the judge on the 23d of April, 1869, and show why the applicant should not have the permission sought. Bush appeared and made oath of his interest, and gave security for the costs of a contest, as required by section 2502, Revised Code, but, as now claimed by his counsel, prosecuted his opposition no further. The judge proceeded to investigate the case, and upon the inquest of the jury, and the evidence of many witnesses, he granted the permission asked for by the applicant. No bill of exceptions was taken, but the appellant assigns as error, apparent upon the record: 1st. That less than fifteen days intervened between the filing of the application and the inquest. 2d. That the return of the jury was not quashed. 3d. That the court erred in the judgment rendered.

The application contained all of the facts and statements required by section 2484, Revised Code. This gave the probate judge jurisdiction of the matter. The return of the sheriff shows that he attended, with a copy of the application, and swore and charged the jury, as directed

by section 2490. The return of the jury was defective in not stating that no residence, or out-house, or garden, thereto immediately belonging, would be overflowed. But this omission was supplied in the judgment entry, which recites that these facts were ascertained on the trial. It is sufficient if the record shows the existence of necessary facts, either actually or by the determination of the court. *Gunn v. Howell*, 27 Ala. 663. The judgment simply states that the pre-requisites for the permission were shown, and therefore it was granted.

The only defect in the proceedings, apparent on the record, is the time between the filing of the application and the inquest. It should have been not less than fifteen days.—§ 2486, Rev. Code. What must be the effect of this? The jurisdiction was conferred by a properly prepared petition. No notice of the time and place of the inquest is required to be given to any one interested in the verdict. The day of trial is a subsequent one, when all interested may appear and contest, and when the finding of the jury may be entirely set aside.—*Martin v. Rushton*, June term, 1869. The appellant was present, personally, at the trial. The judge having rightfully taken jurisdiction, it was incumbent on the appellant to show how he was prejudiced by the want of proper time. He should not be heard to make objections in this court, which he declined to make in the primary court, and which, if then made, might have been remedied at much less cost and trouble to all parties.—*Long v. Commissioners Court*, 18 Ala. 482.

The judgment is affirmed.



ODOM *vs.* SHACKLEFORD.

[ATTACHMENT OF CROP FOR RENT OF LAND.]

1. *Attachment and affidavit, variance between; how can not be taken advantage of.*—A variance between the affidavit and attachment and the complaint, can not be taken advantage of by demurrer to the complaint.
2. *Sheriff, return of; how may be amended.*—The sheriff's return of the levy of an attachment, sued out by a landlord against the crop of his tenants, may be amended, so as to show that the crop levied on was grown on the rented land.
3. *Complaint, amendment of; presumption in relation to.*—Where a complaint has been amended by striking out a party defendant, it will be presumed to have been rightfully done in the absence of proof to the contrary, apparent on the record.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The appellee, Shackelford, sued out an attachment in the circuit court of Henry, against the appellant and one Roberts, for the year's rent of one hundred and twenty acres of land, and gave bond, &c., as required by law. The affidavit states, that the defendants were to cultivate all the land, and to pay (plaintiff) appellee one-fourth of the crop raised thereon, and that if the land had all been planted and properly cultivated, appellee's share of the crop would have been worth \$600; for which amount attachment issued. It is no where shown whether the contract of renting was verbal or written. The attachment, which commanded the sheriff "to levy on so much of the crop grown on said lands," &c., was returned by the sheriff, with the following endorsement: "Levied the within attachment on 8000 pounds of seed cotton, the property of the defendants. October 25th, 1867."

The complaint filed by the plaintiff contained two counts, and claimed \$600 damages for a breach of the contract in not planting all the land, and for not cultivating it as agreed on in the contract. On the trial, the defendants submitted

a motion "to dismiss the levy of the attachment because the return of the sheriff fails to show that the property levied on was of the crop grown on the rented lands." The court overruled this motion, and defendants excepted. The defendants also demurred to the complaint—1st, because the action was commenced by attachment for rent, &c., and the counts in the complaint claim damages for the breach of an agreement sounding in damages; 2d, because the said counts are variant, and set up a different cause of action from that set forth in plaintiff's affidavit and attachment. The demurrer was overruled and defendants excepted. The defendant Roberts then suggested his bankruptcy, and the plaintiff, by permission of the court, then amended the complaint by striking out the name of Roberts and proceeded against Odom alone. The plaintiff then testified to the contract of renting, the same in substance as that set out in the affidavit for attachment, and that if defendant had cultivated all the land agreed on that it would have yielded at least a rental of \$350. This being all the evidence, the court charged the jury, that if they believed the evidence they must find for the plaintiff, and defendants excepted. After the trial was had, and judgment entered, the sheriff moved the court for leave to amend the levy so as to make it show that "the cotton seed levied on were pointed out by the defendants as part of the crop grown on the rented lands." This motion was granted, the levy amended, and defendants excepted.

The errors assigned are the various rulings of the court, and the charge to which defendant excepted.

W. C. OATES, for appellant.

J. C. CLENDENNIN, *contra*.

NOTE BY REPORTER.—This case was decided at the June term, 1869, and was not reported until the present term, because of an application for rehearing being on file.

B. F. SAFFOLD, J.—This suit was commenced by attachment for rent.

The complaint contains two counts, according to the

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form prescribed by the Code, for the breach of an independent agreement. The demurrer to it was properly overruled. A variance between the affidavit and attachment and the complaint can not be taken advantage of by demurrer.—*Vandyke v. The State*, 24 Ala. 81; *Cain v. Mather*, 3 Por. 224.

There was no error in allowing the sheriff to amend his return so as to make it speak the truth.—*McArthur v. Carrie's Adm'r*, 32 Ala. 85.

Section 2809 of the Revised Code authorizes the amendment of the complaint by striking out or adding new parties plaintiff or defendant. Section 2539 makes all joint promises or covenants in writing several, as well as joint. In this case, if the agreement of the parties was in writing, the amendment of the complaint, by striking out the defendant Roberts, was permissible. If not, it was an error. The record does not inform us whether it was verbal or written. The presumption must be in favor of the action of the court. If the plaintiff desired a judgment against both defendants, the proper practice would have been to continue the cause to await the result of the proceeding in bankruptcy.—Bankrupt Law, § 14. He was, however, entitled to his election, so far as the record discloses the facts.

The judgment is affirmed.

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## APPLING, JUDGE OF PROBATE, vs. BAILEY, ASSIGNEE.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *Mandamus* ; *when lies*.—*Mandamus* lies from a superior to an inferior court to compel action, but will never direct how it shall act or control its discretion. Where a court has acted, its action can only be revised by the superior court, on appeal or *certiorari*.
2. *Certiorari* ; *when lies*.—As no appeal is provided by law from the action of the probate court, overruling a motion to make the assignee in bank-



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ruptcy of a removed executor a party to the final settlement of his accounts, and to render a decree in favor of the assignee for the amount due the bankrupt by the estate, a writ of *certiorari* and not *mandamus* is the remedy to revise such action.

3. *Probate court; what jurisdiction has.*—The probate court has jurisdiction to make the assignee in bankruptcy of an executor, who has been removed, a party to the proceedings on the final settlement of the executor's accounts, and to render a decree in his favor for any balance that may be found due to the executor from the estate.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCALEB WILEY.

On the 8th of December, 1868, Hardy W. B. Price, as executor removed of the will of Henry C. Tyson, was to settle his accounts with the estate of said Tyson in the probate court.

Price had been previously adjudged a bankrupt, on his own petition, under the bankrupt law of the United States, approved March 2d, 1867. The administrator *de bonis non* claimed nothing of him. In respect to a demand which Price claimed against the estate of his testator, the cause was continued, and notice issued to John F. Bailey, his assignee, to come into court and make himself a party instead of Price.

On the 15th of February, 1869, to which time the cause was continued, Bailey appeared and propounded his interest, claiming that the estate of Tyson owed Price about \$8,000, and moved the court to ascertain the amount, and decree it in his favor as assignee. The administrator *de bonis non* objected to his being made a party to the settlement. After argument, and consideration of the matter, the court decided that it was not within its jurisdiction to render a decree in favor of Bailey, and for this reason refused to make him a party to the proceeding. Bailey then applied to the circuit court for a rule *nisi* to the probate court, to show cause why a *mandamus* should not issue to compel it to make him a party. On the answer of the judge the rule was made absolute, and hence this appeal.

W. C. OATES, for appellant.

JAMES L. PUGH, *contra*.

B. F. SAFFOLD, J.—*Mandamus* lies from a superior to an inferior court to compel action, but will never direct how it shall act, or control its discretion. Where a court does act, such action can only be revised by the superior court on appeal or *certiorari*.—*Life and Fire Insurance Company of New York v. Wilson*, 8 Peters, 291; *Lamar v. Commissioners Court*, 21 Ala. 772. In this case there was no refusal of the court to act. It issued notice to the assignee to appear, and on his appearance, after full hearing and examination, adjudged that he had not the right to be made a party. As no appeal in such a case is provided by our law, a *certiorari* was the remedy.

The interest of the parties requires us to decide the important question involved. By the 14th and 16th sections of the bankrupt law, the assignee was invested with all the assets of the bankrupt, with the right to recover them by suit in law or equity. The trust property held by the bankrupt did not pass to him, but any debt due from the estate to him, not liquidated, was transferred. As the executor had been removed and called to account, and claimed the demand of \$8,000, no judgment could be rendered in his favor on account of his bankruptcy. The assignee was entitled to recover it in some way. What hindered him from doing so in the probate court? The bankrupt law substituted the assignee to all the rights of the bankrupt which could be made available in the payment of his debts. The probate court, under the constitution of 1867, is one of general jurisdiction in all matters of granting letters testamentary and of administration, and of orphan's business, and contracts for labor. The question for its decision was whether in a proceeding of which it had rightful jurisdiction it would, on motion, allow a party, *civiliter mortuus* as far as that proceeding was concerned, to be substituted by one who had succeeded by operation of law to all of his rights. We see no objection to it. The bankrupt law itself is sufficient authority for such action.—*Ex parte Gist*, 26 Ala. 156. If a distributee of an estate should become bankrupt, before distribu-

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Gabel v. Hammerwell et al.

tion, his interest would pass to his assignee, and it would be competent for the probate court to render a decree in favor of the assignee for such share.—*Graham et al. v. Abercrombie et al.*, 8 Ala. 552. Why not in the case of a removed executor? So far as the estate of Tyson has claims against the removed executor, they may be asserted against him as fiduciary. So far as he has claims against the estate, beyond his liability to it, they may be asserted in the probate court by his assignee.

The judgment is reversed and the cause is not remanded.

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### GABEL vs. HAMMERWELL, ET AL.

[ACTION ON THE CASE FOR WRONGFUL AND VEXATIOUS ATTACHMENT.]

1. *Form of action ; when one may be adopted for distinct causes of action.*—A plaintiff may proceed in one action for damages for breaches of two or more attachment bonds, executed by the same obligors in his favor.
2. *Attachment bond ; what sufficient assignment of breaches of.*—It is a sufficient assignment of breaches of an attachment bond, to aver that the attachment bond was sued out—1st, vexatiously ; 2d, wrongfully ; and that being so vexatiously and wrongfully sued out, it was levied on the goods and effects of the plaintiff, whereby he was injured.

APPEAL from the Circuit Court of Baldwin.

Tried before Hon. JOHN ELLIOTT.

This was an action brought by the appellant against the appellees, to recover damages for the wrongful and vexatious suing out of an attachment, &c. The affidavit for attachment is not set out in the record, nor does it show the ground on which the attachment was sued out. The plaintiff's amended complaint contains two counts, in each of which he claims of the defendants a specified sum of money, on an attachment bond executed by them, which



he sets out literally. There are two bonds differing from each other in amount and time of execution, and he unites a cause of action on each in the same complaint, but in separate counts. The breaches assigned are the same in each count, to-wit, that the attachments were sued out—1st, vexatiously; 2d, wrongfully; and that being so wrongfully and vexatiously sued out, they were levied upon his effects, whereby he was injured.

The defendants demurred to the complaint, and assigned for cause of demurrer—

1. That the cause or ground upon which the two several attachments were issued is not set forth, and no denial of the truth of the affidavit for attachment is made therein.

2. That there is no allegation that the said attachments were sued out maliciously and without probable cause.

3. Because the breach of said bonds is too vague and uncertain to authorize a recovery, nor does it show in what respect nor to what extent special damages accrued to the plaintiff.

4. Because complaint does not show a legal cause of action, nor any actual and sufficient breach of said attachment bonds, which were given at different times and in distinct suits.

The court below sustained the demurrer, whereby the plaintiff was forced to take a non-suit, and plaintiff duly excepted, &c.

The error assigned is, that the court below erred in sustaining the demurrer to the complaint.

LYMAN GIBBONS, for appellant.

D. C. ANDERSON, *contra*.

[No briefs came into Reporter's hands.]

B. F. SAFFOLD, J.—The suit was by one plaintiff against two defendants for damages for breaches of two attachment bonds executed by them. There was no error in this. Where the same form of action may be adopted for several distinct injuries, the plaintiff may in general proceed for all in one action, though the several rights af-

fected were derived from different titles.—Chit. Plead. vol. 1, p. 201.

The breaches were sufficiently assigned. One of the conditions of the bonds was, that the obligors would pay to the defendant in the attachment suit all such damages and costs as he might sustain by the wrongful or vexatious suing out of the attachment. Some one of the several causes for which an attachment may issue should have existed and been known to the obligors when they applied for the attachment. They are not confined in their defense to the one alleged in their affidavit. If any of the grounds for the issue of the attachment existed, it was not sued out wrongfully or vexatiously. If none existed, it was. A clear and well defined material issue was presented by the pleading of the plaintiff.—*Lockhart v. Woods*, 38 Ala. 631; *Wood v. Barker*, 37 Ala. 60; *Kirksey v. Jones*, 7 Ala. 622.

The judgment is reversed and the cause remanded.

### SPRAGUE vs. TYSON.

[BILL IN EQUITY TO SUBJECT MARRIED WOMAN'S SEPARATE ESTATE, BY CONTRACT, TO PAYMENT OF BILL OF EXCHANGE, DRAWN BY HER.]

1. *Foot-note, omission of, at bottom of bill; effect of.*—The omission of the note in writing, at the foot of a bill in chancery, of the particular statements or interrogatories which each defendant is required to answer, precludes the complainant from any advantage to be derived from the failure of the defendant to answer the allegations of the bill.
2. *Bill of exchange, residence of party to be charged; what not sufficient evidence of.*—The name of a place where a bill of exchange was signed appearing on it, is not of itself sufficient evidence of the residence or post-office of the party to be charged.
3. *Bill to subject property of trust estate; who should be made parties.*—Generally, both the trustees and *cestui que trust* should be made parties to a suit in equity respecting the subject-matter of the trust; but where the trusteeship is a naked trust, and there is no trustee, it seems that a decree may be rendered against the *cestui que trust*, when the proceeding is *in rem*.

4. *Separate estate by contract ; what constitutes.*—A conveyance of property, to a trustee for the sole and separate use of a married woman, free from the debts and claims of her husband, creates in her a separate estate by contract.
5. *Separate estate by contract ; how chargeable in equity.*—A married woman, having such a separate estate, may bind it in equity by any contract by which she could bind herself if *sole*.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. N. W. COCKE.

In this cause, which was a bill in equity to subject the separate estate, by contract, of a married woman to the payment of a bill of exchange drawn by her and others, the chancery court granted the relief prayed for in the bill, and directed a reference, &c., and a sale of the trust property.

The other facts arising in the case, and upon which the decision of the court is based, will be found in the opinion.

P. HAMILTON, for appellant.

E. S. DARGAN, *contra*.

B. F. SAFFOLD, J.—The bill in this case alleges, that the complainant, Tyson, is the holder of a bill of exchange, drawn and indorsed by the defendant, Mrs. E. C. Sprague, the wife of A. M. Sprague ; that the bill was duly protested for non-payment, by a notary public in Mobile, where it was payable, and notice thereof deposited in the post-office at Mobile, directed to the defendant at Mobile, and also at Portland, Dallas county, Alabama ; and that the defendant, E. C. Sprague, is the equitable owner of a lot and premises in Mobile, which is her separate estate, by contract, having been conveyed to John S. Hunter, as trustee, for her sole and separate use, free and discharged from the debts and claims of her husband. It is prayed that this property may be sold for the payment of the bill of exchange.

The answer of the defendant on oath is not waived, and there is no foot-note to the bill.

Mrs. Sprague, in her answer, admits that she drew and



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indorsed the bill of exchange, and that her interest in the property sought to be charged with its payment, is as alleged by the complainant. She denies notice of protest, pleads coverture, and that her signature was not witnessed or acknowledged, as required by the statutes for the protection of the separate estates of married women, and demurs to the bill on the ground that the case presented is not such a one as a court of equity will enforce against the separate estate of a married woman.

The evidence of the complainant is, the bill of exchange, with the protest of the notary, and the conveyance of the property sought to be condemned, to John S. Hunter, as trustee of Mrs. Sprague.

As the complainant omitted to append a foot-note to his bill, he can claim no advantage from the failure of the defendants to answer any of its allegations.—Rule 10, Ch. Prac.; *O'Neil v. Robinson*, June term, 1869.

There is an entire failure on the part of the complainant to prove that the notices which he deposited in the post-office at Mobile, directed to Portland and to Mobile, were directed to the residence or nearest post-office of Mrs. Sprague, either at the time of signing the bill, or of giving notice. That the bill purports, on its face, to have been made at Portland, Dallas county, is not alone sufficient evidence of the residence or post-office of the party sought to be charged. The holder must use reasonable diligence to ascertain his address.—*Tyson v. Oliver*, June term, 1869; *Br. Bk. at Decatur v. Pierce*, 3 Ala. 321; *Foard v. Johnson*, 2 Ala. 565. In this case, the bill avers that the bill was made at Portland, but does not assert that the defendant resided there. The answer declares that it was made and endorsed at Mobile.

For the omission of the complainant to prove that he had given due notice of non-payment to the defendant, the decree of the chancellor must be reversed.

Other questions of importance are presented which the interests of the parties require to be now decided.

During the progress of the cause, the suit was abated as to the trustee, on account of his death, and proceeded with against the remaining parties, without any further repre-

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sentation of the legal title. The omission to substitute another trustee, or to make the heirs-at-law of Hunter parties, is suggested in the answer of the defendants, but not by way of plea or demurrer. Unless there was some necessity for substituting some one holding the legal title in the place of the deceased trustee, there was no error in omitting to do it.—*Ozley v. Ikelheimer*, 26 Ala. 332. The heirs-at-law of Hunter should not have been so substituted, because the trust estate did not descend to them.—Rev. Code, § 1593; *McDougal's Adm'r v. Carey*, 38 Ala. 320.

Generally, both trustees and *cestui que trusts* should be made parties, but where the trusteeship is a naked trust, and there is no trustee, it seems that the whole interest is before the court, and that a decree may be rendered, especially when the proceeding is *in rem*.—Story's Eq. Plead. §§ 207, 211.

The estate of Mrs. Sprague, created in the property conveyed to Hunter, as her trustee, is essentially different from the separate statutory estate of a married woman. Her husband is not her trustee by operation of law. The trustee is liable for the rents, income and profits, if he receives them. The property is not bound for contracts for articles of comfort and support of the household, as provided by Revised Code, § 2376, and can not be sold for their payment as directed by Revised Code, § 2377.—*McMillan v. Hurt*, 38 Ala. 665. It is her separate estate by contract. So far as this estate is concerned, Mrs. Sprague is regarded in equity as a *femme sole*, and may bind it by any contract by which she could bind herself, if sole and unmarried.—*Gunter v. Williams and Wife*, 40 Ala. 561; *Paulke v. Wolfe, Gillespie & Co.*, 34 Ala. 541; *Booker v. Booker*, 32 Ala. 473; *Roper v. Roper*, 29 Ala. 247. It is not necessary that the intention to charge her separate estate should be proved when she gives her written obligation for the payment of money.—*Ozley v. Ikelheimer*, 26 Ala. 332.

The decree is reversed, and the cause remanded.

J. F. DAVIS ET AL. *vs.* TENNESSEE DAVIS ET AL.

[MOTION TO DISMISS APPEAL.]

1. *Restitution; when necessary to obtain reversal of decree.*—One who receives and retains the purchase money of land sold under a decree, can not reverse the decree, if the reversal will divest the title.
2. *Errors; against whom appellant can not assign.*—One appellant can not assign error against his co-appellants.

APPEAL from Chancery Court of Pike.

Heard before Hon. N. W. COCKE.

The facts are sufficiently stated in the opinion.

WALKER, MURPHEY & WINTER, and J. D. GARDNER, *pro* motion.WM. C. OATES, *contra*.

B. F. SAFFOLD, J.—The reasons assigned by the appellees in support of their motion to dismiss the appeal in this case are: 1st. That one of the appellants, James F. Davis, who was a defendant to the original bill, and a complainant in the amended bill filed for the exclusive purpose of making him a party complainant, is also an appellee. 2d. That the other appellants have received the money procured from the sale of the land under the decree, which they seek to reverse, and still retain it.

The original bill was answered, not under oath, by all of the defendants; the answer being signed by their solicitors. By the amended bill James F. Davis, a defendant to the original bill, was made a party complainant. The decree for the sale of the land was rendered on the original and amended bill, decree *pro confesso* and testimony. The land was sold under the decree. By affidavits filed, it is shown that all of the appellants, except James F. Davis, received their proportion of the cash payment.



One who receives and retains the purchase money of land, sold under a decree, cannot reverse the decree, if the reversal will divest the title. He must make restitution.—*Knox's Distributee v. Steele, Adm'r*, 18 Ala. 815; *Prewitt v. Garner*, 32 Ala. 13.

As to the position of James F. Davis, there is no rule of practice which will allow one appellant to assign errors against his co-appellants.—*Knox's Distributee v. Steele, Adm'r*, 18 Ala. 815.

The appeal is dismissed without prejudice.

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### MANNING vs. KOHN.

[ACTION BY PAYEE AGAINST ACCEPTOR OF BILL OF EXCHANGE.]

1. *Act of January 18, 1867, in relation to city courts, &c.; construction of.* The provision of the act of January 18, 1867, that in a city court, whose terms are held oftener than twice in each year, a space of at least twelve months must intervene between the return and judgment terms, is complied with in a case when the suit was returned to the February term, 1867, and judgment rendered at the February term, 1868, that being the time prescribed for holding a regular annual term of the court. (PETERS, J., dissenting.)—*Held*, that a judgment could not be legally rendered until after a space of at least twelve months had intervened, and that no period of time, short of this, came within the meaning of the act.
2. *Acceptor; when not liable for damages.*—The acceptor of a bill of exchange is not ordinarily liable for damages.
3. *Judgment; when will be reversed and rendered.*—Where the complaint claims damages against an acceptor improperly, and the judgment is for the demand, this court will reverse, and render judgment for the correct amount, at the cost of the appellee.

APPEAL from the City Court of Montgomery.

Tried before Hon. THOS. M. ARRINGTON.

This was an action by the payee against the acceptor of a bill of exchange, dated May 11th, 1861, and due four

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months after date. The complainant claimed damages thereon. Judgment, by default, was rendered for an amount which was equal to the principal, and five per cent. damages thereon at maturity, with interest to the rendition of the judgment.

The errors assigned are :

1st. That the judgment was rendered at a term of the court at which it was not authorized to be rendered.

2d. That the judgment was rendered for the sum of \$1,054.25, when it should have been for the less sum of \$1,030.

ELMORE & GUNTER, for appellants.

WALKER, MURPHEY & WINTER, *contra*.

B. F. SAFFOLD, J.—This suit was instituted in the city court of Montgomery, on a bill of exchange made in 1861. The summons was issued February 4th, 1867, executed February 7th, 1867, and returned to a term of the court commenced February 11th, 1867. The judgment was rendered March 28th, 1868, at a term which commenced on the 10th February, 1868, and was by default.

The appellant objects that a period of at least twelve months did not intervene between the return and judgment terms, as required by law.

At the time this suit was begun, an act of the legislature to regulate judicial proceedings was in operation, which required that the first term of the court after the commencement of the action should be deemed the return term, only; the second term, an appearance and pleading term, and the action should not be tried before the term next after the appearance term thereof.—Act of February 20th, 1866. By an amendment to the 8th section of this act, approved January 18th, 1867, if the suit was in a city court, where terms are held oftener than twice in each year, a space of at least twelve months must intervene between the return and judgment terms.—Acts, 1866–7, p. 176. By an act, approved December 7th, 1866, three terms of the city court of Montgomery, in each year, are

required to be held, commencing on the second Monday in February, and the first Monday in June and October.

The constitution requires the circuit court to be held twice a year in each county, and the times appointed by law are certain Mondays of months, which divide the year as nearly as practicable, so as to make semi-annual terms. The interval between the commencement of the return and judgment terms in the circuit court, under the law of February 20th, 1866, was about twelve months. It could not be exactly twelve calendar months, because the court commencing on a given Monday in a month would generally begin on a different day of the month, thereby increasing or lengthening the interval a little. Did the legislature, in making a special provision, that in city courts when terms are held oftener than twice in a year, a space of twelve months should intervene between the return and judgment term, mean to attach a significance to the length of time requisite to obtain a judgment in those courts different from that intended in the circuit courts? Without this provision, judgments could have been obtained in the city court several months sooner than in the circuit courts, under the same law, and a discrimination, without reason, between debtors would have been effected. The construction of the provision contended for by the appellant would vary the time of obtaining judgment in the city courts from twelve to eighteen months, according to the day of the month on which the Monday appointed for the commencement of the term should fall. We think the provision was intended to make equal the time in both courts, and that the judgment term was the next annual term after the return term; that the period between the second Monday in February, 1867, and the second Monday in February, 1868, they being the legally appointed times for the holding of the winter terms of the city court of Montgomery in each year, constituted the twelve months required by the statute.

The acceptor of a bill of exchange is in general not liable for damages.—*Hanrick v. Farmer's Bank of Chatahoochee*, 8 Port. 539.



A mere clerical error in the amount of the recovery, this court will correct at the cost of the appellant. But in this case the complaint claims damages, and the judgment is for the demand. It is manifest from the record that five per cent. damages has been included in the judgment. For this error the judgment is reversed, and a judgment for the proper amount will be rendered in this court.—Rev. Code, 3502. The appellee will pay the cost of the appeal.

PETERS, J., (*dissenting.*)—I regret to dissent from the opinion and judgment just announced by a majority of the court. I can not assent to this judgment without violence to what I esteem one of the plainest rules of the constitution. That is, to take the language of the law to mean just what it declares, when its words are wholly free from doubt.

This was an action instituted in the city court of Montgomery, in which court terms are held oftener than twice in each year.—Pamph. Acts, 1866–67, p. 102, § 1, No. 117. The writ was issued on February 4th, 1867, and made returnable to a term of said city court, held on the second Monday in February in the same year; that is, on February 11th, 1867; this was the return term of said writ. The judgment term of the suit thus brought could not be held sooner than twelve months after the date last above said; that is, February 11th, 1867. But the term at which the judgment in this case was rendered commenced on the second Monday in February, 1868, which was February 10, 1868. This was less than twelve months from the return to the judgment term of the city court in which the suit was brought. The judgment was by default. This was forbidden by law.

The language of the statute is this: "But the return and judgment terms on all suits brought in such courts *must be intervened by a space of at least twelve months.*"—Pamph. Acts, 1866–67, p. 176.

This language is too plain for doubt or quibble, as it appears to me. Twelve months is a fixed certain space of time. It is mathematically exact. A space shorter than

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this can not be twelve months. If the court can shorten this space one day, it can shorten it as many days as it chooses. The power to vary from the statutory period, is a power to legislate. The language of the act is our only guide. To quit this is to quit the law ; and in the end to make shipwreck of all safe legal logic, and to give to fallacies the force of truth. As well might it be contended that five days were a week, as to assert that less than twelve months is a "space" "at least twelve months" in length. Here the space that intervened between the return and judgment term of this suit was one day less than twelve months—such is my calculation. The court ought to have waited till the June term of said court before the judgment was rendered.

I, therefore, think the judgment should be reversed, and the cause remanded, at the costs of the appellee in this court, and of the appeal in the court below.

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### WALTON vs. WILLIAMS.

[ACTION ON BILL OF EXCHANGE BY PAYEE AGAINST PARTY THERETO, AS ACCEPTOR.]

1. *Acceptor ; when may be considered indorser, guarantor, or acceptor, supra protest.*—When a bill of exchange exhibits the signature of one to whom it is not directed across its face, and another name in the lower left hand corner where that of the drawee is usually placed, the latter will be deemed the drawee, and the former will be considered the indorser, guarantor, or acceptor, *supra protest*, according to the evidence.
2. *Parol evidence ; when admissible to explain relation of parties to bill.*—In such a case parol evidence is admissible to explain the relation of the parties to the bill, when sued on by the payee.
3. *Non-payment, notice of ; who entitled to.*—An acceptor, *supra protest*, is entitled to notice of non-payment by the drawee.

APPEAL from Circuit Court of Hale.  
Tried before Hon. B. L. WHELAN.

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The appellee sued the appellant as acceptor of a bill of exchange, which was as follows:

"Exchange, \$1,093 84. Greensboro, January 1st, 1862.

"On the first of January next, pay this, my only bill of exchange of this tenor and date, to the order of D. C. Williams, the sum of one thousand and ninety three 84-100 dollars, value received, negotiable and payable at the office of the Planters Insurance Company, and charge the same to account of,

Yours truly,

"JAMES J. WALTON.

"JAMES J. WALTON."

John W. Walton wrote his name across the face of the note, in the place the acceptor usually signs.

The plaintiff introduced the bill, and proved that the name of the defendant, written across its face, was in his handwriting. "The defendant proposed to testify, in his own behalf, that he was asked by his brother, James J. Walton, the drawee, in the presence of the plaintiff, the payee, to sign a bill. He told the plaintiff that he was in the habit of signing on the [back of the] bill, to which he replied, that was a mere matter of form. His brother had asked him to indorse the bill. He wrote his name across its face at the request of the plaintiff, who told him that the face of the bill was the proper place for writing his name as indorser. He signed the bill, not as acceptor, but as indorser, and the plaintiff received it with that understanding." This evidence was excluded by the court, and the charge given to the jury, that if they believed the name written across the face of the bill to be the signature of the defendant, it was an acceptance, and they must find for the plaintiff.

The exclusion of the evidence, and the charge given, are now assigned as error, as well as the refusal to give several charges asked by the defendant below, and not necessary to be further considered.

JAS. J. GARRETT, for appellant.

RICE, SEMPLE & GOLDTHWAITE, *contra*.

SAFFOLD, J.—The only evidence that the defendant



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accepted the bill, is his signature across its face. It is where the acceptor's signature is usually found, and in the absence of proper rebutting testimony this would be sufficient proof of the fact, if it was directed to him, or without direction to any one. But the name of James J. Walton is also found in the position on the bill usually occupied by the drawee, and he must be considered the drawee as well as the drawer.

Where a bill is directed to a particular person, no one but the person to whom it is directed can accept it, except for honor.—*May v. Kelly & Frazier*, 27 Ala. 497. If the defendant was an acceptor, he was one *supra* protest, and his obligation was, that if the bill was not paid by the drawee upon due presentment at its maturity, then upon protest for non-payment, and due notice thereof to him, he would pay it.—*Story on Bills of Ex.* § 123 ; 3 Wend. 491.

There was no proof, in this case, of protest and notice, and for this reason the charge of the court was erroneous.

The plaintiff was the payee. It was, therefore, clearly competent to show by parol the intention of the parties, at the time the contract was entered into, with regard to their several liabilities among themselves, and the relation which they were to bear to the bill.—*Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

The evidence of the defendant, who was a competent witness under section 2704 of the Revised Code, ought to have been admitted.

The judgment is reversed and the cause remanded.

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### CURRY vs. REYNOLDS.

[ACTION ON PROMISSORY NOTE.]

1. *Section 2661 of Revised Code ; constitutionality of.*—Section 2661 of the Revised Code, which requires a return, appearance, and trial term in certain cases, is not unconstitutional,

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Curry v. Reynolds.

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APPEAL from Circuit Court of Talladega.

Tried before Hon. CHAS. PELHAM.

Action, founded on a due-bill executed February 6, 1860, commenced 9th of March, 1868, and summons returnable to spring term of circuit court of said year. Judgment by default at fall term, 1868, or (in this case) the appearance term.

The error assigned is the rendition of the judgment at the term at which it was rendered.

BRADFORD, MARTIN &amp; ISBELL, for appellant.

JOHN T. HEFLIN, *contra*.

B. F. SAFFOLD, J.—In cases like this, the first term after the commencement of the action is the return term, the second term is the appearance or pleading term, and the cause is not to be tried before the next term after the appearance term.—Rev. Code, § 2661.

The judgment in this case was rendered at the appearance term, contrary to the provision of the section quoted. The constitutionality of this law was elaborately discussed in the case of *Ex parte Pollard*, (40 Ala. 77,) and decided affirmatively. We are satisfied with that decision, and the reasoning by which it was sustained. The end of law is justice. Inflexible rules can not be applied to the vicissitudes of human affairs. The contracts of the citizens should be inviolable, but, when broken, the remedy must be, in some measure, consonant to the times. If we hold the remedy to be a part of the contract, we will be continually applying rules adapted to peace and prosperity to periods of adversity and extreme distress. The sovereign power owes protection and preservation to the citizen, as well as the enforcement of contracts, and it is on this ground that nations assume to cancel the obligations of their citizens through the agency of a bankrupt law. The constitutional prohibition against impairing the obligation of contracts, and hindering and delaying justice, was aimed more at the robbery and denial of right by the supreme power, which had formerly been prevalent, than at any

modified accommodation between the creditor and debtor, through changes of remedy in times of public misfortune, which might benefit society without the sacrifice of either.

The judgment is reversed, and the cause remanded.

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### JONES vs. LAWSON.

[SETTLEMENT OF INSOLVENT ESTATE IN PROBATE COURT.]

1. *Statute of limitations; for what length of time suspended.*—The statute of limitations was suspended in this State from the 11th day of January, 1861, to the 21st day of September, 1865. (Re-affirming *Coleman v. Holmes*, at present term.)

APPEAL from the Probate Court of Perry.

Tried before Hon. B. S. WILLIAMS.

The facts appear from the opinion.

MOORE & LOCKETT, for appellant.

W. L. BRAGG, *contra*.

B. F. SAFFOLD, J.—In this case, the appellant filed for allowance in the probate court a promissory note against the insolvent estate of which the appellee was the administrator *de bonis non*. The note was due one day after date, and dated March 11th, 1862. It was filed November 23d, 1868. The sole error assigned is, that the court sustained the plea of the statute of limitations of six years.

The interval from the maturity of this note to the 21st of September, 1865, must be deducted from the time necessary to complete the bar of the statute.—*Coleman v. Holmes*, at present term. The court erred in sustaining the plea.

The judgment is reversed, and the cause remanded.



WATSON ET AL. *vs.* KNIGHT.

[TRESPASS AGAINST CONSTABLE AND SURETIES FOR WRONGFUL LEVY AND SALE OF PERSONAL PROPERTY.]

1. *Complaint, defects in; how can not be taken advantage of.*—When the complaint shows a substantial cause of action, its defects, which would have been available on demurrer, can not be taken advantage of on error, when the parties were present in the court below, and failed to make the objection there.
2. *Estoppel; fraud, under plea of; what evidence inadmissible.*—In a suit for trespass against an officer for selling plaintiff's property on an execution against a third person, the plaintiff is not estopped, because the defendant in execution, in his presence and without objection from him, claimed the property as exempt to himself from execution, when the plaintiff's title to the property had been derived from a purchase from the defendant in execution, and when the judgment might have been a lien on the property, if it had not been exempt to such defendant at the time of the sale. Such evidence, unsupported by any thing more definite, is inadmissible under a plea of fraud.
3. *Charge to jury; what not erroneous to refuse.*—There is no error in refusing to charge the jury that a judgment is a lien upon certain property, which may be properly claimed as exempt from execution.

APPEAL from the Circuit Court of Cleburne.

Tried before Hon. W. L. WHITLOCK.

This was an action of trespass by the appellee, Knight, against the appellants, to recover damages for trespass in taking certain property of the plaintiff, to-wit: a wagon and yoke of steers, and selling the same, under an execution against W. M. Beason.

The defendants pleaded, in short by consent: "1st. Not guilty. 2d. Justification under legal process. 3d. Fraud." Upon which pleas issue was joined, a trial had, a verdict rendered in favor of the plaintiff for \$154 damages, &c.

From the bill of exceptions, it appears that the property levied on was in the possession of Beason at the time a judgment was rendered against him by a justice of the peace, by virtue of an execution on which the levy and

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Watson et al. v. Knight.

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sale, complained of, were made ; the property so remained in his possession until the morning of the levy, when it was put in possession of the plaintiff, who had purchased it from Beason about a month before. On the day of sale the plaintiff presented an affidavit to one of the defendants, the constable, that the property levied on was his own. The defendant then offered to introduce proof, that at the same time that plaintiff offered the above affidavit, the defendant in execution, Beason, in the presence and with the knowledge of plaintiff, offered an affidavit claiming the property as exempt to himself from execution under the exemption laws of Alabama, as the head of a family, and that plaintiff made no objection whatever. The court refused to allow the introduction of this evidence, and defendants excepted.

The defendants then introduced the execution, and "after proving the rendition of the judgment and the issuance of the execution by a justice of the peace, who was proven to be duly elected and qualified, and performing his duties as such, and after proving the placing of the execution in the hands of one of the defendants, who was proven to be duly elected and qualified as constable, &c.," asked the court to charge the jury, that "if they believed the evidence, the said judgment was a lien on the property in controversy, and the defendant, Watson, as constable, was authorized to levy on and sell said property, under said execution." This charge the court refused to give, and defendants excepted.

That portion of the transcript on which errors were assigned has been torn off, and the briefs of counsel are not on file.

J. T. HEFLIN, for appellant.

ELLIS & CALDWELL, for appellee.

B. F. SAFFOLD, J.—This was an action of trespass by the appellee against the appellants, for trespass in taking personal property.

The complaint alleges a substantial cause of action. No objection was taken to it in the court below, but issue

was joined on pleas in bar to the merits. Advantage can not be taken of its defects, if any, in this court.—Revised Code, 2811 ; *Stewart v. Goode & Ulrick*, 29 Ala. 476.

The defendant, Watson, as constable, levied an execution from a justice's court on a wagon and yoke of steers, claimed by the plaintiff, and in his possession at the time, and sold them as the property of W. M. Beason. To support his defense he offered evidence that on the day of sale Beason claimed the property as exempt from levy and sale to him, as the head of a family, in the presence of the plaintiff, who said nothing. It had been previously shown that Beason formerly owned the property, and had sold it to Knight about a month before the sale by the constable, and had given him possession before the levy. The evidence offered was rightly excluded by the court. The claim of exemption set up by Beason was as much a defense of his right to sell to the plaintiff, as the claim of property in himself, and did not call for contradiction. The defendant had a short time before been presented with the sworn claim of the plaintiff, and the declaration of Beason was an additional reason why he should not sell. If the property was the plaintiff's, it was not liable for Beason's debt. If it was Beason's, it was exempt from sale under execution.

The charge asked by the defendant was properly refused. The facts therein stated might have been true, and the property not subject to levy and sale.

The judgment is affirmed.



BYRNE *vs.* MARSHALL.

[REAL ACTION IN THE NATURE OF EJECTMENT.]

1. *Different written instruments ; when will be presumed to evidence but a single contract.*—When two instruments of writing are executed on the same day, relate to the same subject-matter, and one refers to the other, the presumption is that they evidence but a single contract.
2. *Fee absolute, upon condition, &c.; what instrument creates.*—J. being indebted to M., conveyed to him certain real estate in payment, and received from him at the same time a writing, not under seal, nor attested or acknowledged, in which M. bound himself to leave the property under J.'s control and possession for three years, with the privilege of selling any or all of it, and retaining whatever amount he realized by such sale, over the valuation placed upon such portion in the sale to M. and the taxes and interest,—*Held*, that M.'s estate in the property was a fee absolute, upon condition of divestiture by a sale by J., within the time specified, and as to a purchaser from J., the latter was to be considered the absolute owner, and that the formalities of the execution of the conveyance attached to the writing.

APPEAL from the City Court of Selma.

Tried before Hon. J. S. CORBIN.

This was an action, in the nature of ejectment, brought by the appellee against the appellant, to recover a certain lot in the city of Selma.

The main facts of the case, as appear from the bill of exceptions, reserved on the trial, are as follows: On the 13th of October, 1860, William Johnson sold and conveyed to the appellee, Marshall, a number of lots in the city of Selma, including the lot in question, by a deed in fee, in payment of a debt due from him to Marshall, of \$81,500. This conveyance was duly acknowledged and recorded. The property thus sold was valued in separate parcels by persons chosen by the parties. Johnson was dissatisfied with this valuation. On the same day that Johnson executed the deed to Marshall, Marshall, ("as a part of the same transaction," according to the witness Johnson's tes-

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Byrne v. Marshall.

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timony,) executed the following writing, and delivered the same to Johnson :

“SELMA, Oct. 13th, 1860.

“Having this day purchased from Mr. William Johnson certain real estate in the city of Selma, Ala., as set forth in deed made by him of this date to me, amounting in the aggregate to the sum of \$81,500, viz: [here follows description of property sold, in parcels, with the valuation of each parcel annexed, among which is included the lot in suit,] I hereby bind myself to leave the property under his control for the term of three years, and give him the privilege of selling any or all of said property, and to give him the entire benefit of all he may obtain for said property, over and above the price stated, including the interest and taxes thereon.

(Signed)

“B. F. MARSHALL.”

This writing was not under seal, nor was it attested or acknowledged.

William Johnson continued in the possession of the property, and on the 2d September, 1863, before the expiration of the three years, sold and conveyed the lot sued for, and another, to his son, F. L. Johnson, and put him in possession. Proof of the loss of said deed being made, secondary evidence was admitted to prove its contents and execution. It was proven to be “in the usual form and with the usual covenants,” and to have been duly attested and acknowledged before a justice of the peace. The consideration of this sale was \$10,000 in groceries and dry goods, valued at much less than they were worth in Confederate currency, and at much more than their value in lawful money, before or since the war. The estimated value of these two lots in the sale to Marshall was \$6,000. Marshall was not informed of this sale, at the time, nor was the consideration paid him. He refused to ratify it, when informed.

On the 28th of September, 1863, F. L. Johnson sold and conveyed in fee the lot in suit to Mrs. M. J. Byrne, the wife of the appellant, who, with her husband, went into possession on that day, and so continued until the commencement of this suit.

The court, in a lengthy charge as to the law of the case,

which need not be further noticed, charged the jury that the power granted to Johnson, by the instrument made by Marshall, to sell, gave him no power to convey, and must be construed as a mere right to contract to sell; that any sale made under the power was subject to the confirmation of Marshall, &c. The court, at the request of the appellee, charged the jury, that "if they believed the evidence they must find for the plaintiff;" to which charge, and the general charge of the court, as well as the refusal to give a charge requested by the defendant, and which it is unnecessary to set out, the defendant duly excepted.

The charges given and refused are now assigned for error.

PETTUS & DAWSON, and ALEX. WHITE, for appellant.

MORGAN & LAPSLEY, *contra*.

B. F. SAFFOLD, J.—A construction of the writing given by Marshall to William Johnson will dispose of the assignments of error. This writing, with the evidence of William Johnson, sufficiently shows that it was made on account of Johnson's dissatisfaction with the valuation of his property; that it formed a part of the consideration of the deed from Johnson to Marshall, and ought to be considered in connection with it; that the two instruments evidence but a single contract. They were made on the same day, relate to the same subject-matter, and one refers to the other.—*Strong's Ex'rs v. Brewer*, 17 Ala. 706; *Sewall v. Henry*, 9 Ala. 24; *Doe, ex dem. Holman v. Crane*, 16 Ala. 577.

What must be the legal effect of the two writings embodied in one instrument? What estate was vested in Marshall by Johnson's deed? A fee absolute. How was it affected by Marshall's writing? It was liable to be divested by Johnson's selling all or any part of the property, within three years, for a sum equal to the prescribed valuation and the accrued interest and taxes, or by refunding that amount of money to Marshall. Such an estate is one upon condition subsequent.—2 Coke upon Litt. 201, *a*; 4 Kent's Com. 120; 7 Cranch, 237; 14 Pick. 467; *Sewall v. Henry*, 9 Ala.



24. "It stands indifferent whether it be the speaking of the grantor or grantee; for in that case it shall be referred to the grantor, as no condition can be reserved or made but on the part of the donor, lessor or feoffor".—2 Coke on Litt. 203, *b*, note 1.

How is the defeasance in this deed to affect a purchaser from Johnson? Johnson is under obligation to sell for more than the valuation and the interest and taxes, but this requisition is complied with if the average of the sales is more. Must the purchaser see to this? When the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor must be taken as the absolute owner of the estate conveyed, as to the rights of creditors and purchasers.—Rev. Code, § 1594. Every power of disposition is deemed absolute, by means of which the donee of such power is enabled in his life-time to dispose of the entire fee for his own benefit.—Rev. Code, § 1598. Marshall having suffered Johnson to reserve a power of defeating his grant, though upon conditions good between them, must be deferred to one to whom he has virtually given permission to purchase the estate.—Sugden on Vendors, 2d Part, m. pp. 155, 180; Same on Vendors and Purchasers, (6th, ed.) pp. 640, 641. Whatever advantage, if any, Marshall might have derived from the record of his deed, was nullified by the possession of Johnson, the one being as notorious as the other.

The writing of Marshall was a clear authority to Johnson to sell.—*Morrow v. Higgins*, 29 Ala. 448. Johnson was not his mere agent. The power reserved to him, was not a power of attorney, it was a power coupled with an interest and irrevocable.—Rev. Code, §§ 1608, 1612. Though a seal is not necessary to convey the legal title, this writing related to the deed, and was clothed with its formalities. *Habergham v. Vincent*, 2 Vesey, 228; Rev. Code, §§ 2599, 1535. The moment Johnson sold the lot, Marshall's title was divested in favor of the purchaser, who was remitted to Johnson's original title, by operation of law.—Rev. Code, § 1594. The charges given and refused by the court, not being in conformity with the principles declared in this opinion, the judgment is reversed and the cause remanded.

## OWENS ET AL. vs. GRIMSLEY ET AL.

[BILL IN EQUITY BY WARD AND ANOTHER ENTITLED TO ANNUITY CHARGED ON WARD'S PROPERTY, AGAINST GUARDIAN AND SURETIES FOR RE-EXAMINATION AND SETTLEMENT OF ACCOUNT MADE IN PROBATE COURT.]

1. *Misjoinder of parties; multifariousness, or want of equity; what bill not defective for.*—A bill in chancery by a ward, and another entitled to an annuity charged on the property of the ward, against the guardian and his sureties for a settlement of the guardianship account, is not defective for misjoinder of parties, multifariousness or want of equity.
2. *Decree; what plea, not vitiated by.*—A decree against a defendant as surety of a guardian is not vitiated by a plea of bankruptcy, unsupported by proof.
3. *Guardian, decree against; what no defense against.*—The fact that the property of a ward was derived from the proceeds of the sale of slaves, is no reason why a decree should not be rendered against the guardian on his final settlement.

APPEAL from Chancery Court of Barbour and Henry.  
Heard before Hon. B. B. McCRAW.

The facts upon which the decision is based are sufficiently set out therein.

W. C. OATES, for appellant.  
J. A. CORBITT, *contra*.

B. F. SAFFOLD, J.—John B. Taylor became the guardian of Moses Grimsley, with Owens and Teague the sureties on his bond, in 1859. As such guardian, he received the property of his ward, which was charged with a certain sum as an annuity in favor of Matthews Grimsley, also a minor, during his minority. On application by his sureties to be relieved from their obligation, Taylor, on the 22d of April, 1863, gave a new bond, with Edmond Cody as surety. Cody died December 12, 1863, and Jesse M. L. Burnett became his administrator January 20, 1864. On the 26th of January, 1864, Burnett applied to be released

as administrator from liability as surety for Taylor, who not being able to give another bond, settled his accounts on the 4th April, 1864, when a decree for \$981 40 was rendered against him. On the 30th October, 1865, Burnett having resigned, A. E. McGarity was appointed administrator *de bonis non* of Cody's estate.

Moses Grimsley, by next friend, and Matthews Grimsley filed their bill of complaint against Taylor, Owens, Teague, and McGarity, as administrator of Cody, in which they alleged that they were not represented in the settlement made in 18 4 by the guardian of Moses Grimsley; that Taylor converted their money to his own use soon after receiving it; that Moses has never received any benefit from his property, and Taylor is insolvent. They pray that the settlement may be re-examined in the chancery court. The bill was demurred to for want of equity, multifariousness, and misjoinder of parties.

The chancery court has concurrent jurisdiction of settlements between minors and their guardians, which has not been taken away by any power conferred on the probate court.—*Gould v. Hayes et al.*, 19 Ala. 438.

It appears from the evidence that Taylor never received any money from Teague, the register, but having purchased some of the property, by the sale of which the trust fund was created, took his own note and the notes of others as cash. He must, therefore, be held to have received so much money. His sureties are bound upon it, as he received it before they were released. The decree was not against McGarity. It does not appear that the court allowed any credit for the Confederate bonds. The decree is joint for Moses and Matthews, without designating what part for each.

The demurrer was properly overruled. The bill was not deficient in equity, nor was it multifarious. It sought a review of the guardian's settlement, at which the ward was not represented. There was no misjoinder of parties, because the rights of the complainants differed only in degree. The property belonged to one, charged with an annuity in favor of the other. There was no error in rendering the decree against Teague. He had appeared and



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Ex parte Morris & Blair.

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answered the bill, and his plea of bankruptcy was unsupported by any evidence. The decree was rendered on sufficient proof, and is not invalid because the trust property was derived from a sale of slaves.

The decree is affirmed.

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### EX PARTE MORRIS & BLAIR.

[APPLICATION FOR MANDAMUS.]

1. *Record; what power courts have over, after final adjournment.*—After the final adjournment of a court it ceases to have any power over its records, other than that incident to all courts of general jurisdiction, of correcting clerical errors, where the record affords matter upon which to base such correction.
2. *Judgment; when error to vacate, at a subsequent term.*—It is error for a circuit court, at a subsequent term, on motion of defendant, to vacate a judgment in favor of the plaintiff, and to declare the same null and void, upon the alleged ground that the court had no jurisdiction to render such judgment.
3. *Mandamus; when will not be issued.*—Such judgment is a final judgment, upon which an appeal will lie to this court, and a *mandamus*, or rule *nisi* will not be issued requiring the circuit court to set aside and vacate the order and judgment declaring said judgment null and void.

This is an application by Morris & Blair for a rule *nisi*, or an alternative *mandamus*, to the circuit court of Bullock county, to require said court to set aside and vacate an order and judgment of said court, made at the fall term of said court, to-wit, on the 4th day of December, 1869, setting aside and declaring null and void a certain judgment, recovered by said applicants at the spring term of said court, in the year 1868, for the sum of three hundred and sixty-one 92-100 dollars, against one Lewis Christian.

The order and judgment sought to be avoided by this application, is set out in the bill of exceptions as follows:

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Ex parte Morris & Blair.

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"Morris & Blair } Motion having been made by the  
                   *vs.* } defendant to declare null and void,  
 Lewis Christian. } and to set aside the judgment rendered  
 in this case, at the spring term, 1868, for three hundred  
 and sixty-one 92-100 dollars, on the grounds that the  
 court had no jurisdiction, and that the venue of said cause  
 was never legally changed from Barbour to Bullock  
 county, and the parties being represented by their counsel,  
 and the defendant submitting to the court the allegations  
 of his motion; it is considered by the court that said  
 motion be granted, and said judgment be set aside and  
 declared null and void, and that the defendant recover of  
 the plaintiffs the costs of this proceeding, for which let  
 execution issue."

The plaintiffs in that judgment, the applicants in this  
 behalf, excepted to the ruling of said court, setting aside  
 their said judgment, and in declaring the same null and  
 void, and taxing them with the costs.

SEALS, WOOD & ROQUEMORE, *pro* motion.

J. N. ARRINGTON, *contra*.

PECK, C. J.—The order and judgment of said court,  
 setting aside, &c., the applicants' judgment, rendered at the  
 spring term of said court, 1868, for the reasons stated in  
 the said order and judgment, is undoubtedly erroneous.  
 After the rendition of said judgment and the final adjourn-  
 ment of the court, the power of said court over said  
 judgment, except to correct clerical errors, &c., ceased to  
 exist.—*Van Dyke v. The State*, 22 Ala. 57. But all this  
 being admitted, can the error of the said court be cor-  
 rected on such an application as this? We think not.  
 The order and judgment of the court setting aside the  
 applicant's judgment, and declaring it null and void, and  
 taxing them with the costs, is a final judgment, and an  
 appeal, and not a *mandamus*, is the proper remedy to cor-  
 rect the error or errors in said order and judgment.

At the last term, in the case of *Broyles v. Maddox*, we  
 indicated the proper practice in such cases. In this case,  
 if the circuit court had set aside the applicant's judgment,

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Pitts v. Singleton et al.

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and in the same order had granted a new trial, then, the remedy before final judgment, would have been by a *mandamus*; in such case, there would have been no final judgment; the new trial would have left the original cause still pending and undetermined in that court.

We presume, on a new application to the circuit court, what is here indicated will induce the said circuit court to set aside and vacate the said order, declaring the said judgment null and void, and order an execution to be issued on the applicants' said judgment against the said Lewis Christian.

The application for a *mandamus* is denied, at the applicants' costs.

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### PITTS vs. SINGLETON ET AL.

[CONTEST ON APPLICATION TO DECLARE ESTATE OF DECEDENT INSOLVENT.]

1. *Credit, allowance of; when error.*—It is error on the final settlement of an executor to allow him items of credit for funds on hand, unless such funds, or the value of the property of the estate converted into such funds, have been charged to him as assets of the estate in his hands.
2. *Worthless assets; when credit may be allowed for.*—Where funds, which came legally into the hands of the executor, have become worthless without fault on his part, he may on proof of that fact leave the same out of his account altogether; or, if they are charged to him, he may have a corresponding credit allowed.
3. *Executor, liability of; for converting property into Confederate funds.*—An executor is a trustee, and can not change the property of the estate received by him into other funds without authority of law. If he so changes the property in his hands into Confederate notes and bonds, without authority of law, he must suffer the loss, and it is error to allow him on final settlement a credit for such funds, which have become worthless, unless, perhaps, where the same was so directed by the will.

APPEAL from the Probate Court of Shelby.  
Tried before Hon. ———.

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The facts are stated in the opinion.

BRADFORD, MARTIN & ISBELL, for appellant.

A. J. WALKER, *contra*.

PETERS, J.—This was an application by the executors of John Singleton, deceased, to have the estate of said deceased declared insolvent. Said executors are the appellees in this suit. The application was made in the probate court of Shelby county, and the petition was filed on the 30th day of August, 1867, and finally heard on the 31st day of October of the same year. The application was sustained, and the estate declared insolvent. There is nothing in the record which shows that the proceedings to establish the insolvency were irregular up to the final hearing. The report of insolvency shows that the assets of the estate remaining in the hands of the executors, at the date of the filing of the report, was the sum of \$1,610.92. This seems to have been a debt owing to the estate of said deceased for lands sold on the 3d day of December, 1855, which fell due on the 3d day of December, 1856, twelve months after the date of said sale.

The statement of claims against the estate consisted of four items: One a note for \$524.88, due March 1, 1856; another note, of like character, for \$524.88; also, a claim for \$500.00, and another claim for \$1,000.00; which several sums amounted in the aggregate to \$2,549.76. Upon this showing the estate was insolvent.

On the 3d day of December, 1867, after said estate was declared insolvent, the executors proceeded to make final settlement of their executorship of said estate. During the progress of this settlement, they proposed to credit themselves with several items in Confederate treasury notes and bonds, which items are in the following words:

“By amount Confederate notes, new issue, in the hands of executors at the time of the surrender, now valueless.....	\$1,542 00
By amount lost on this sum, in discounting the old for the new issue at the rate of three dollars for two.....	771 00

By amount Confederate bonds in the possession of executors at the close of the war, received for Confederate notes..... 800 00."

These three items amount to the sum of \$3,113.00. The record does not disclose when the testator departed this life, but it shows that the lands of the testator were sold on the 3d day of December, 1855. He must, therefore, have died before the date of this sale. Then it is known to the court that he could not have owned any assets of the character of these Confederate notes and bonds at his death, because they did not then exist. These funds, whatever they may have been, must have come into his estate after his death. In whatever way this may have happened, it can not be doubted that as soon as these funds did come into the possession of the executors, they became liable to be charged with the same as property of the testator, to the extent of their value, real or nominal. *Pro tanto*, they became assets of the estate; and the executors should have charged themselves with the same in the debits, and have asked a corresponding credit, as for valueless assets in their account, so that their introduction or omission would have made no difference in the result; or their worthlessness might have been shown, and they might have been left out of the account altogether as insolvent claims, if they came legally into the hands of the executors.

But in this settlement these funds are not charged at all among the debits or assets received, as they should have been; and a credit was allowed for their whole amount. This was improper, unless it was shown that there was a portion of the assets of the estate which had been legally converted into these funds, and which assets had been charged against the executors. But nothing of this sort is shown or pretended in the record. Then, unless the executors had been charged with the amount of these Confederate funds in the first instance, or with some portion of the estate of the deceased, out of which they had been derived, they are not entitled to a credit on their account. Not having been charged with them, directly or indirectly, they should not be allowed a credit for them;

otherwise, there will be a credit allowed without any corresponding charge for the same item, which must have come into the hands of the executors as a part of the assets of the deceased.

Moreover, if these Confederate bonds and notes were worthless, it was enough to have shown this fact in the record, and then they might have been omitted as items of the account altogether. If this is done, the result of the accounting will leave a balance of assets against the executors of some \$826.50, taking the *data* for the estimate, as they are given in the account as rendered in the record.

If, however, the executors changed the property of the deceased received by them into Confederate notes and bonds, without authority of law, and these notes and bonds subsequently became worthless, the executors must suffer the loss, unless it is shown that they are not in fault. Executors are trustees, and trustees can not change the estate of the beneficiary in their keeping into other funds, without authority of law. If they do, and there is loss to the beneficiaries thereby, they must suffer this loss.—*Hall v. Hall*, June term, 1869.

For the error of allowing the credit for the amount of the Confederate treasury notes and bonds as above shown, the judgment of the probate court is reversed, and the cause is remanded for further proceedings in the court below, in conformity to this opinion; and the appellees will pay the costs of this appeal in this court and in the court below.



# REPORTS

OF

## CASES ARGUED AND DETERMINED

AT THE JUNE TERM, 1870.

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NOTE BY REPORTER.—FECK, C. J., sat but a few days during the latter part of the term, being absent for the remainder of the time on account of sickness.

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### MURRELL *vs.* THE STATE.

[INDICTMENT FOR ENTICING SERVANT UNDER WRITTEN CONTRACT.]

1. *Enticing servant under written contract; indictment for, when sufficient.*  
An indictment under section 3691 of the Revised Code, for enticing servant under written contract, is sufficient if it states the offense in the language of the statute, although the facts which constitute the offense may be charged in the alternative.
2. *Same.*—The law in the Revised Code, against “enticing servant under written contract,” is still of force, and is a valid law. It is an enactment of the legislature of Alabama, under the provisional government set up by authority of the United States, and has not been repealed, but continued in force by the recognition of the present rightful government of the State.
3. *Same; not in violation of “civil rights bill.”*—Said enactment is not in violation of, or in conflict with, the provisions of the law of congress, commonly known as the “civil rights bill.” It does not discriminate in favor of, or against, any class of citizens. Any person competent to make written contracts may employ laborers, or may be employed as a laborer, under its protection, without regard to race, color, or condition.
4. *Same; infancy of laborer, what no defense against.*—The infancy of the laborer interfered with is not a good defense for one who violates this law.

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Murrell v. The State.

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5. *Same; what not necessary to conviction.*—In order to convict under this statute, it is not necessary to show that the second or subsequent employer knew at the time of hiring that a previous subsisting contract existed, if, after being properly notified of the previous existing contract, he failed and refused to discharge the laborer, but still kept him in his service.
6. *Same; what contracts effected by.*—To bring a contract for hire within the provisions of this enactment, the whole contract must be in writing. Contracts by parol, although valid without reference to this enactment, and binding upon the parties, do not come within the protection of the act.
7. *Same; rights of parties to contract for labor.*—In such contracts for labor, as in other contracts, the obligation must be mutual, and if such contract be dissolved for any legal reasons, the laborer can make a second contract, without regard to the first.

APPEAL from the Circuit Court of Barbour.  
Tried before the Hon. J. McCaleb Wiley.

The facts of the case are fully stated in the opinion.

SEALS, WOOD & ROQUEMORE, for appellant.  
JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—This is an indictment under section 3691, of the Revised Code, “for enticing servant under written contract.” The count charging the offense is in the following words:

“The grand jury of said county charge, that, before the finding of this indictment, David Murrell knowingly interfered with, hired, employed, enticed away, or induced Jacob Hameter, being a laborer or servant, who had stipulated or contracted in writing to serve the said D. H. Hameter a given number of days, weeks, months, or for one year, before the expiration of the term stipulated or contracted for, such contract being in force and binding upon the parties thereto, without the consent of the said D. H. Hameter, to whom the service was due, given in writing or in the presence of some *reliable* white person, against the peace and dignity of the State of Alabama.”

This indictment was found at the spring term of the Circuit Court of Barbour county, in this State, in the year 1870.

On the trial, it was demurred to by the accused, for the following reasons: "1st. That the indictment charges in the disjunctive several distinct offenses in the same count; 2d. That the indictment fails to aver that the servant Jake had previously contracted in writing with another, which contract was in force, and for any stipulated time; 3d. That the indictment fails to charge any offense known to the law; 4th. That the statute under which the defendant is indicted is not in force." This demurrer was overruled by the court, and the accused pleaded "not guilty," "and went to trial before the jury upon the issue thus made."

The jury found the defendant, Murrell, guilty, and assessed a fine against him of fifty dollars. For this sum the court rendered judgment against him, and for costs. From this judgment, Murrell appeals to this court.

In appeals, in criminal cases, it is the duty of this court to look into the whole record, and render such judgment as the law demands.—Rev. Code, § 4314.

The indictment in this case is strictly analogous in form with those given in the appendix of the Revised Code. The statement of the facts constituting the offense is laid down in the very language of the statute, except, perhaps, one single word; that is, the word *reliable* is used instead of *veritable*, before the words "white person." If this is not a clerical mistake committed in copying the indictment into the transcript, it is not such a departure from the phraseology of the Code as would *vitate* the indictment. An indictment which pursues the language of the statute is sufficient; and a charge in the alternative does not make it bad.—Rev. Code, §§ 3691, 4112, 4119, 4141, 4123, 4125; *Johnson v. The State*, 35 Ala. 370; *Mason et al. v. The State*, 42 Ala. 543; *Wicks v. The State*, June term, 1870. The statute copied into the Code was an enactment of the provisional government, which was acknowledged and recognized by the government of the United States. This law has been continued in force, by the legislative recognition of the Revised Code, as a law of the provisional government of this State.—Act of Congress to "provide for the more efficient government of the rebel States," passed March 2, 1867, § 6; Pamph. Acts 1868, p. 7. This statute



clearly forbids certain acts therein named, and the commission of such acts is punishable in the manner set forth in the Revised Code.

This makes such acts an offense.—Revised Code, § 3540. Then the court below did not err in overruling the demurrer to the indictment.

On the trial, it appears from the bill of exceptions that certain persons, among whom was one Jake Hameter, calling themselves "the undersigned laborers," contracted in writing with D. H. Hameter to "work on the plantation of Miss Lizzie Hameter during the year 1870." This contract was signed by said D. H. Hameter on his part, and by said Jake Hameter on his part. It bears date the 8th day of January, 1870, and was made and entered into in the county of Barbour, in this State. It appears, from the proofs, that said laborer, Jake Hameter, commenced work under said contract, and continued to labor and work on said farm until about the 22d of March, 1870, when he left the employment of said D. H. Hameter, and went to the plantation of the accused, said Murrell, and employed himself to work with him, said Murrell, on his farm, at the rate of eleven dollars per month. It was also proven, that under said contract with said D. H. Hameter, said D. H. Hameter was to furnish said laborer, Jake, with "clothing, shoes, &c., during the year, charging him therefor;" and that a few days before he (Jake) left the employment of said D. H. Hameter, he applied to him for money to buy him a coat, and said D. H. Hameter declined to let him have the money. But when he did this, he told Jake to call at his room and he would let him have one of his old coats. And when the laborer, Jake, hired to Murrell, "he was nearly naked and in great need of clothing." Jake was examined as a witness, and he stated that he had left the service of said D. H. Hameter for the reason that he could not get the coat or money to buy it, and that "immediately after leaving the service of" said D. H. Hameter, "he went up to Fort Browder and there found" the accused, "and told him," (the accused,) that "he had quit the said" D. H. Hameter, "and was hunting a place to live." And

thereupon, the accused employed him, and he had continued to labor with said accused ever since.

It was also shown that said Jake did not disclose to said Murrell, "that he was or had been under any contract, written or verbal, with said D. H. Hameter." While Jake was at work with said Murrell, and after he had left said D. H. Hameter, Murrell was informed by said D. H. Hameter that he (Jake) had contracted in writing with said D. H. Hameter to work on his farm as abovesaid during the year 1870, and requested him to discharge said laborer. This Murrell refused to do, saying—"Jake is yonder on my farm, and if you have any more right to him than I have, go and take him." And after this, said laborer still remained in the employ of said Murrell, "laboring on his farm."

It was also shown that Jake was only eighteen years of age when he entered into said contract in writing with said D. H. Hameter to labor for him as abovesaid. The venue was admitted.

Upon this testimony, about which there was no controversy, the court gave two charges to the jury and refused six others. The accused excepted to the first charge given, and to the refusal of the six charges which were denied.

The first charge was in these words: "The court, *ex mero motu*, charged the jury, that if the State proved that Jake was under a valid written contract with the prosecutor, then binding upon the parties and not terminated, and that the defendant hired Jake while this contract was in existence, and was afterwards notified of the contract and refused to discharge Jake, then, upon these facts, the defendant must be found guilty, unless the defendant proved to the satisfaction of the jury that at the time he hired him, Jake was not under a binding subsisting written contract with the prosecutor." This charge was excepted to. In it are contained the legal elements which enter into all the other charges which were given.

The charge thus given is free from any just exception. The evidence was not disputed, and the charge was not upon the effect of the testimony. It is fair, and does not mistake the law, and is applicable to the facts established by

the proofs.—Rev. Code, §§ 2678, 3691, 3693; *Morris v. Hall*, 41 Ala. 510.

Under this law, the whole contract must be in writing, though parties are not bound to contract in this way. They may contract by parol, if they choose, and when they contract in this latter manner, this statute does not apply. But after the contract of hiring is once entered into in writing, as required by the statute for a specified time, then any conduct of a third party which induces the laborer to leave his employment, or which induces him to remain away after he has left, if the first contract be not broken, but still subsisting and untermiated, which conduct occurs between the commencement of the employment and its end, while the contract of the first engagement remains unbroken,—this is such an interference, if knowingly committed, as the law forbids.

Both parties are equally bound to keep and perform the stipulations of the contract, and if one of the contracting parties violates its stipulations, then the other is no longer bound. But it is not necessary that the second hirer should know, at the time of entering into his engagement, that there had been a previous engagement, if after being notified that such is the fact as required by the statute, he refuses to discharge the laborer, who is still bound by a subsisting previous contract. A subsisting previous hiring, and this refusal to discharge a laborer bound by it, are *prima facie* evidence of guilt, and if these facts remain unrebuted they are sufficient to sustain a conviction. Then, the first and second charges asked by the defendant below were properly refused upon the evidence in this case.

The third charge was as follows: "That the contract read in evidence is voidable so far as Jake Hameter is concerned, if the jury believe from the evidence that said Jake is not 21 years of age."

This charge, though it may be, under some circumstances, correct as a mere abstract principle of law, is not the law applicable to this case. Infancy is a privilege personal to the infant himself alone, for his protection. He may avoid his contracts of a certain character made in minority, but the appellant in this case can not avail himself of this



privilege. Besides, the contract of an infant, in general, is voidable only, and not absolutely void, and it must be avoided before it can be said to be nought.—*Jefford's Adm'r v. Ringold & Co.*, 6 Ala. 544; 24 Ala. 420; 2 Kent, 234, *et seq.* (marg.); 23 Texas, 252; 3 Green. 343. Then the infancy of the laborer could not avail as a defense to the accused in this proceeding.

The statute certainly did not intend to exclude minors from such employments, in the present condition of affairs in this State. It must happen in frequent cases that one class of children, who are minors, have been widely separated from their parents, and who must wholly depend upon their labor for support. To declare that these children should not be able to enter into labor contracts under this statute might deprive them of the only means of subsistence within their reach, during the most necessitous period of their lives.

The evil which the statute is intended to suppress is, possibly, greater in the case of infant laborers than in that in which they are adults. There is no great interest in the State which exceeds that of the planter and the farmer in importance. It is the basis of all other branches of business among our people. It was the purpose of the legislature to protect the labor thus engaged. The evil here denounced is one of ancient date, which has occurred, and which is likely to occur again in connection with this important department of employment. At common law it was a wrong to entice away one's hired servant, and the party who did this, without a legal justification, was liable in an action at law for damages.—3 Black. Com. 142. This statute has gone farther, and has made this wrong a public offense.

The statistics of labor show that almost or quite one-half the laborers usually engaged in the business of agriculture in this State are minors. Did the legislature intend that it should be an offense to entice away or interfere with a laborer of adult age, punishable by heavy fine, but no offense at all, if the laborer should be a minor? Certainly not. There is nothing of this kind that can be justly inferred from the language of this enactment or its purpose. Had

this been the legislative intent, there would have been a *proviso* to the act, by which it would have been declared that the provisions of this law did not apply where the contracting laborer is a minor. But such a *proviso* was not added to the act. Hence, it is not to be inferred that it was intended. In legislative enactments that which is left out, was intended to be left out. In view of this construction of this important statute, the *third*, *fourth* and *fifth* charges asked by the defendant below and refused by the court, and which, in effect, endeavored to set up the infancy of the laborer enticed, as a defense to the indictment, were properly refused. Their denial was not error.

The record does not show with certainty that the sixth charge was accepted to. There are two charges marked with the number "7." One of these has the word "given," and the other the word "refused," written under it. But in a subsequent portion of the transcript it is shown, that a charge marked "7" was asked and refused, and the refusal was excepted to. Both of these charges were abstract. There was no proof to support them. They were therefore properly refused.—*Gliddon v. McKinstry*, 28 Ala 408; *Stewart v. Bradford*, 26 Ala. 410; *Brown v. Jones*, 24 Ala. 463; *Jamison et al. v. Dearing's Ex'r*, 41 Ala. 283; *Martin v. Hill*, 42 Ala. 285.

It is contended by the learned counsel for the appellant, that the law, upon which the indictment in this case is founded, is void, because it is opposed to the provisions of the act of congress, sometimes called the "civil rights bill;" which is entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication."—U. S. Statutes at Large, 1866, chap. XXXI, p. 27. The first section of this act defines who are citizens of the United States, and secures to them "the same rights in every State and territory of the United States" that any other citizen may enjoy. A very slight attention to the language of sections 3691 and 3693 of the Revised Code, will show that their provisions will allow any person, who may choose to do so, to hire laborers, or to be hired as laborers, on a farm or plantation. There is no discrimination in any way in favor of any person, or against

any person, of whatever race or color or condition they may be. There is no restraint imposed upon any person on either side of the contract, except that imposed by the agreement of the parties themselves. This law, then, can not be an infringement of the civil rights bill.—*Elizabeth Turner's Case*, and *United States v. Rodes*, Paschall's Ann. Const. United States, p. 273.

The judgment of the court below is affirmed. The appellant will not be released from custody until discharged by due course of law.

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## MANAWAY vs. THE STATE.

### [INDICTMENT FOR FORGERY.]

1. *Agent; what competent witness to prove.*—The agent of a company to whom application has been made for payment of a forged demand against the company, is a competent witness to prove his agency, in a prosecution for forgery against the person who attempted to collect the money.
2. *Forged instrument; must be produced or accounted for.*—The instrument alleged to be forged must be produced at the trial, or its absence satisfactorily accounted for.
3. *Evidence; what admissible as part of res gestæ.*—Genuine papers of the same kind as the one alleged to be forged, which were presented with it, and taken from the accused at the same time, are part of the *res gestæ*, and admissible as evidence.
4. *Mobile Charitable Association, certificate of; what necessary to sustain conviction for forgery of.*—To sustain a charge of forging a certificate of subscription purporting to be made by the Mobile Charitable Association, the first payment of the money required as a condition precedent to the right of the company to set up a lottery, must be shown. But it is not necessary to show that subsequent payments required have been made.

APPEAL from Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

The appellant, Manaway, was indicted under § 3702 of



the Revised Code for falsely and fraudulently forging a certificate for the payment of money, purporting to be one made by a partnership association, composed of J. C. Moses, F. H. Fowler and E. Bebee, authorized by an act of the legislature, approved December 31st, 1868, with the intent to defraud; &c. The defendant went to trial on the indictment, on plea of "not guilty;" was found guilty and sentenced to two years imprisonment in the penitentiary.

On the trial, as shown by the bill of exceptions, the State introduced J. B. Stone, who testified, in substance, that he was the agent of the association, and authorized by it to issue such certificates of subscription as the alleged forged one purported to be; that in the county of Dallas, and State of Alabama, on the 24th March, 1870, the defendant came to the office, threw down four tickets on the table and said: "Mr. Stone, I've got you! Pay me my money." Three of the four tickets thus thrown on the table were in Stone's handwriting; the fourth ticket was a forgery. The ticket, if genuine, would be worth \$37.50. Witness had seen defendant write, but could not swear that the writing on the ticket alleged to be forged was in the handwriting of defendant. Witness, after looking carefully at the forged ticket, told defendant that the ticket was a forgery, when defendant again responded: "Mr. Stone, I've got you! Pay me my money." Witness then had defendant arrested.

The defendant "objected to the evidence of the witness going to the jury, unless he could swear that the handwriting on the forged ticket was the handwriting of the defendant," and, also, unless he could establish by other evidence than his own, authority to write the ticket which he swore he wrote." This objection was overruled, and defendant excepted. Boyd, another witness for the State, testified to the same facts as Stone; the same objection was made to his testimony, on the same grounds; this was overruled, and defendant excepted.

Jack Massey, another witness for the State, testified that on the night of the drawing, while Stone was at the wheel, he saw defendant in the office, and saw him take a paper about the shape and size of the printed lottery ticket and

put in under the stamp usually used by the agent, and push the stamp down on it. He was not near enough to see whether there was any thing on the paper or not. The State then introduced the lottery certificate alleged to be forged, together with the other tickets which the witness, Stone, swore he wrote. The defendant objected to the introduction of the tickets, and the alleged forged ticket. The court overruled the objection, allowed the tickets to go to the jury, and defendant excepted.

The State then introduced "the charter of the Mobile Charitable Association," which may be found in the acts of 1868, p. 511. This charter confers certain powers and privileges on the parties therein named, and their associates as partners, and gives them "authority to form themselves into a partnership association," for the purposes of carrying out the objects of the act. The second section of said charter is as follows:

"Section 2. *Be it further enacted*, That before commencing business under the provisions of this act, said parties shall pay, or cause to be paid to the board of school commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars, and annually thereafter a like amount, for the term of ten years, or so long as said partnership shall choose to do business under the provisions of this act; it being understood and agreed, that said payment of one thousand dollars per annum by said partnership to said common school fund, is the consideration upon which this privilege is granted; and whenever said company shall fail to pay said sum, according to the provisions of this act, then, and in that case, their right to do business shall cease."

The defendant objected to the introduction of the charter; but his objection was overruled, and it was allowed to be offered as evidence, and defendant excepted. The defendant further objected to the introduction of the charter, as sufficient evidence of the legal organization of the company, unless the State should show that the first \$1,000 had been paid, and said company had not failed to pay said sum, per annum, up to date. This objection was overruled, and defendant excepted.

This was all the evidence for the State, except some testimony "sustaining Jack Massey's character for truth and veracity."

The defendant then offered to prove, in substance, by two witnesses, that on the night of the arrest they were going to the office to see if they had drawn a prize; that on their way they met witness, Jack Massey, and they asked him "if he knew that Manaway had been arrested," and he answered "No! What for?" And on being told that it was for forging a lottery ticket, he replied that "they had better go and see about him," and on arriving at the lottery office asked to see the forged ticket, and then remarked that "he had known Manaway some time, and that he could not believe that he did it." The declaration at the lottery office the court excluded, because the proper predicate had not been laid for its introduction, and defendant excepted.

The defendant also introduced two witnesses, who swore that "they had knowledge of the witness, Massey, and the character which he bore in the neighborhood in which he lived for truth and veracity, and that from their knowledge of his character they would not believe him on oath." This was all the evidence.

The defendant requested the following charges:

1st. That the State must show the legal organization of the association before doing business, to show their certificates and tickets to be of any value.

2d. That unless the association first paid the \$1,000 required by its charter, before doing business, its certificates and tickets are of no value.

3d. That the certificate before the jury is of no weight in the law, unless in connection with Massey's evidence, and if they do not believe his evidence the certificate is of no importance.

These charges were refused, and the defendant excepted to the refusals severally.

W. H. F. RANDALL & G. W. GAYLE, for appellant.  
JOSHUA MORSE, Attorney-General, *contra*.



B. F. SAFFOLD, J.—The motion to exclude the testimony of the witness, Stone, was properly overruled. The witness was competent to prove his authority to issue the certificates.—Phil. Ev., vol. 1, § 416, 2 vol. § 63. His want of knowledge of the defendant's handwriting was no objection to the admissibility of his evidence.

The instrument alleged to be forged was obliged to be introduced at the trial, or its absence satisfactorily accounted for.—Bishop's Crim. Pro., 2 vol., § 387; *Butler v. The State*, 30 Ala. 43. The genuine tickets taken from the prisoner at same time were a part of the *res gestæ*, and constituted a link in the chain of evidence. No reason is alleged why they should have been excluded.—*Mason & Franklin v. The State*, 42 Ala. 532; *Givens v. The State*, 5 Ala. 747.

The act of the legislature authorizing the association to make and sell certificates of subscription was competent evidence. The testimony tending to impeach the witness, Massey, was inadmissible for want of the proper predicate. *Bradford v. Barclay and Wife*, 39 Ala. 33.

The only error in the record is the failure, on the part of the State, to prove that the company had paid the \$1,000 required as a condition precedent to their right to set up a lottery.—Acts, 1868, p. 511. Without the performance of this condition the certificates were illegal, and not the subject of forgery.—Rev. Code, 3616.

The objection does not apply to the subsequent payments required.

The judgment is reversed and the cause remanded. The prisoner will remain in custody until discharged by law.

HOBSON *vs.* THE STATE.

## [PROSECUTION FOR MALICIOUS MISCHIEF.]

1. *Malicious injury to animals ; what essential ingredient of.*—Malice towards the owner is an essential ingredient of the offense of malicious injury to animals.
2. *Same ; when malice may be inferred.*—When the injury is unlawfully committed, requisite malice may be inferred from the instrument used, the wantonness of the deed, and any attendant circumstances which would justify the inference in other crimes where malice is a necessary constituent.

APPEAL from the Circuit Court of Hale.

Tried before Hon. M. J. SAFFOLD.

The appellant was tried on a statement by the solicitor, on appeal from the county to the circuit court, for "unlawfully and maliciously killing a hog, the property of Nathan Lewis, colored, &c." The appellant was "hog minder" for the owner of the plantation on which Lewis lived, and as such was in the habit of carrying a gun. The hogs of Lewis and other laborers on said farm, had lately eaten up some kids belonging to the plantation, and on that occasion, Lewis and other farm hands being present, the proprietor of the place informed them that they must keep their hogs up in pens as they had contracted to do, or otherwise he would have the hogs shot, and instructed the appellant in the hearing of Lewis and other negroes to shoot any hogs getting out. "Neither Lewis nor any of the hands objected to this, but promised to keep their hogs up." The appellant and Lewis had lived on the same place for years, and no ill feeling or grudge existed between them. It was proved, however, that when the hog was killed, the hog being among the kids at the time, that appellant had sent Lewis word "he had a dead hog out there," and remarked that "he would load up his gun and and blow him up, if he made any fuss." These were all the material facts developed on the trial.

After the court had charged the jury as to the law applicable to the case, the appellant requested the following charges in writing :

1st. "It is incumbent on the State to prove to the satisfaction of the jury that the defendant killed or wounded the animal, both unlawfully and maliciously ; and unless they are satisfied beyond a reasonable doubt that the defendant had malice against the owner of the hog they must acquit him."

2d. "If the jury believe that the defendant killed the hog of Lewis, and thought he had a right to do so under the instructions of his employer, the proprietor of the premises, and without malice to the owner of the property, they must acquit the defendant."

The court refused to give these charges; defendant excepted, and now assigns the refusal to give the charges as error.

COLEMAN & SEAY, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The appellant was prosecuted under § 3733 of the Revised Code, for malicious injury to animals.

The real essence of this offense is malice towards the owner of the animal injured.—*Northcot v. The State*, 43 Ala. 330 ; *Hill v. The State*, 43 Ala. 335 ; 37 Ala. 459 ; 7 Ala. 728.

The two charges asked should have been given.

It is not indispensable to a conviction that the defendant did or said any thing, either before or after the commission of the act, indicative of express malice towards the owner. Malice may be inferred, if the injury is unlawful, from the instrument used or the wantonness of the deed, and from any attendant circumstances which would justify the inference in other crimes where malice is an essential constituent.

The judgment is reversed and the cause remanded. The prisoner will be kept in custody until discharged by due course of law.



CRAWFORD *vs.* THE STATE.

## [INDICTMENT FOR BURGLARY.]

1. *Section 3695 of Revised Code ; indictment under, what should show.*—An indictment for burglary, under section 3695 of the Revised Code, for breaking into and entering a “shop,” should show that the shop is one in which “goods, merchandise or other valuable thing is kept for use, sale, or deposit.” To charge that the shop was broken into and entered “with intent to steal,” is not enough.
2. *Charge to jury ; what, should not be given.*—In a criminal case, a charge which instructs the jury, in referring to a part of the testimony for the defense, “that you are not bound to believe one word of the testimony unless you are satisfied it is true, and of this you are the judges,” is too broad. It can not be said to be in support of the credibility of the testimony referred to, and most probably would be construed by a jury as an assault upon it, and as an intimation that it was unworthy of influence in making up their verdict. The jury can not capriciously reject any evidence, delivered on the trial before them, unless it is in some way impeached or contradicted in a manner allowed by law.
3. *Absent witness ; written statement of what would testify ; effect and force of.*—The written statement of what an absent witness would testify, if present, when accepted in lieu of the witness, must have the same force, so far as credibility is concerned, as the oral statement of the witness would have.—Rule 16, Rev. Code, p. 821.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The opinion states the facts.

W. C. OATES, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—This was an indictment under § 3695 of the Revised Code, for burglary ; it was demurred to because it did not aver that the shop, broken into and entered, was a shop in which “any goods, merchandise, or other valuable thing, is kept for use, sale or deposit.” The demurrer was overruled.

The indictment in this case is clearly bad, and the demurrer should have been sustained.

The forms prescribed in the appendix of the Code are sufficient only where they are applicable. When they are not applicable, then other analogous forms must be devised to be used in their stead.—Rev. Code, § 4141.

And when analogous forms are constructed, they must state the facts constituting the offense in ordinary and concise language, in such a manner as to enable a person of common sense to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment.—Revised Code, § 4112. This is the rule of the Code for the framing of indictments, when no form is given.

The form of the count used in this instance is in these words :

“The grand jury of said county charge, that before the finding of this indictment, Alfred Crawford broke into and entered the shop of Council Batchelor with intent to steal.”

It is said, that “in a criminal charge there is no latitude of intention, to include any thing more than is charged ; the charge must be explicit enough to support itself.” It has been repeatedly settled by this court, that a statement of the facts which constitute the offense in the language of the statute, is sufficient.—*Wicks v. The State*, June term, 1870 ; *Johnson v. The State*, *ib.*

Here the language of the charge is, “that Alfred Crawford broke into and entered the shop of Council Batchelor with intent to steal.” This is intended to make an allegation of burglary.

The statute defining burglary in this State is in these words :

“Any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building within the curtilage of the dwelling-house, though not forming a part thereof ; or into any shop, store, warehouse, or other building, in which any goods, merchandise, or other valuable thing, is kept for use, sale, or deposit, is guilty of burglary.”—Rev. Code, § 3695.

Formerly, it was held that statute laws were to be read without regard to punctuation, and their meaning and pur-

pose were to be sought for, in the words used and their location in the sentence. But in modern times, the legislative authority not only fixes the words to be used, and their position in the sentence, but it also superintends and fixes the punctuation. No laws are now passed without careful attention to this often important particular.

The section above quoted, which defines burglary in this State is clearly divided into two members. The first makes burglary to consist in breaking into and entering certain *houses* and *buildings* therein named, "*with intent to steal or commit a felony.*" The character of the *house*, and the *intent* with which it is broken and entered, make the offense. These, then, are the facts to be stated in an indictment under the first member of the section. This is the form given in the Code.—Rev. Code, p. 811.

The second member of this section, which is divided by the word "*or*" and semi-colon, from the first, adds to the *houses* broken and entered another character which did not belong to the houses mentioned in the first. That is, they must be shops, stores, warehouses, or other buildings, "*in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit.*" To break into and enter an empty shop, store, or warehouse or other building with intent to steal, where there was nothing to be stolen, would hardly be placed upon the same degree of criminality as the breaking into and entering the dwelling-house, or the building within the curtilage of the dwelling-house. It is not so much the house that is intended to be protected, as the things within the house, and the uses to which the house is put. It is a rule of construction, that where one thing is named, other things not named are excluded. Then the characteristics of the houses named in the first member of the section are excluded from those named in the second, and *vice versa*. Then an indictment under the first member, must contain a proper description of the house, as well as the intent with which it had been broken and entered. So, likewise, must an indictment under the second member contain an analogous description of the houses therein mentioned. There are, then, two statements of facts,—one in the first and one in the second member of



the section,—which constitute the crime of burglary ; and these statements should be carried into the charge made in the indictment. This indictment is founded upon the facts which constitute burglary under the second member of the section abovesaid, and it should, like the indictment given in the appendix to the Code, which is under the first member, contain a statement of all the facts therein named, among which is the characteristic fact, that the house must be one “in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit.” This is one of the facts necessary to be proven in order to show guilt. This would make the form analogous to that given in the Code.

This indictment fails to complete the description of the house or building mentioned in the statute with the allegation of the fact, that it is a house or building “in which any goods, merchandise or other valuable thing, is kept for use, sale or deposit.” This is the proper construction of the statute according to its punctuation, its meaning and its purpose.

The court below, therefore, erred in overruling the demurrer to the first count, and for this reason the cause must be reversed.

It is unnecessary, in this view of the case, to consider the charge of the learned judge to the jury in the court below, at length. In the main it is correct. But it assumes that the accused could be convicted of burglary upon satisfactory proof of the facts alleged in the indictment. This is contradictory of the construction of the statute above given. It was therefore erroneous.

There is also another feature of the charge which is not wholly free from objection. In referring to a certain portion of the testimony for the defense, the court says—“yet you are not bound to believe one word of this testimony, unless you are satisfied it is true, and of this you are the judges.”

This clause of the charge must have some meaning. It can not be construed in support of the veracity of the testimony referred to. It may be construed into an assault upon it, and would justify the jury in its rejection as un-

worthy of any influence upon their verdict. In this view of it, it would be erroneous. If the testimony delivered upon the trial is unimpeached, either by the manner of the witness, his knowledge of the facts, his connection with the parties or by contradictions, or for some other legal reason, the jury must treat it as true. They have no legal right causelessly to discredit any portion of the evidence, unless there are legal grounds for such a discrediting. Any other course would imperil the fairness and impartiality of the trial. If the jury can capriciously and causelessly discredit a portion of the testimony for the defense, they may discredit the whole. If the law exists, as intimated by the learned judge on the trial below, it exists without limit; and it may be applied to the testimony of the defense or to the testimony of the prosecution. This would give the jury power to convict or to acquit according to their discretion, and not according to the evidence. This is not a correct statement of their duty. They must try the issue joined according to the evidence.—Revised Code, § 4292. They have no authority to discredit any portion of the evidence, merely because they suspect it to be false, when their suspicion is not founded upon a legal reason. The charge in this instance was too broad. It was calculated to invade the *right* of the accused to a *fair and impartial* trial.—*Ex parte Chase*, 43 Ala. 303. If the admitted written statement of the evidence of the absent witness was accepted in lieu of the witness, it is entitled to stand in his shoes. It is no worse and no better than his oral testimony would be. The charge of the court is possibly calculated to make a different impression on the minds of the jury. It was therefore improper.—Rev. Code, § 2678; Rule 16, Rev. Code, p. 821.

The conviction and judgment of the court below are reversed, and the cause is remanded for a new trial. The appellant will be held in custody until discharged by due course of law.

BRAZIER *vs.* THE STATE.

## [INDICTMENT FOR MURDER.]

1. *Reversal ; what not sufficient cause for.*—The use of the word “charged” in an indictment, instead of the word “charge,” if the indictment is otherwise formal, is not such a defect as will justify a reversal after verdict in the court below, the objection being made for the first time in this court on appeal.
2. *Same.*—On appeal, in a criminal case, the whole record is to be looked to in order to enable the supreme court to make up its judgment ; and if the whole record so explains itself as to make all the parts consistent, a cause will not be reversed because it appears that the accused was indicted by the name of *Henderson Brazier*, but applied for and obtained a removal of the trial in the name of *John H. Brazier*, when the judgment itself shows that *Henderson Brazier* and *John H. Brazier* are the same person, no objection or exception being made in the court below.
3. *Panel ; when should be quashed.*—A jury not drawn in strict accordance with the requirements of the statute, should be quashed on motion of the accused. A failure to have the name of each juror written on a separate slip of paper, and drawn as required by the statute, is a fatal irregularity, for which the jury drawn should be quashed.

APPEAL from the Circuit Court of Fayette.

Tried before Hon. W. S. MUDD.

The appellant was indicted for murder, tried and found guilty of murder in the first degree, and sentenced to the penitentiary for life. On the trial, as shown by the bill of exceptions, the following proceeding occurred in relation to drawing the names of the jurors. After the number of jurors had been summoned, and a list thereof duly served on the defendant, as required by law, “it appeared, during the progress of the trial, that only forty-five separate slips of paper had been placed in the hat, from which to draw the jurors for the trial of defendant ; that these slips contained the names of forty-five of the names contained in the list served on defendant, and that one of said slips contained the name of two of said persons, written on



opposite sides of the same slip. The discovery of this fact was not made until said slips had been drawn from the hat, and ten persons had been impaneled and accepted without objection, as jurors in the case. After the slips in the hat were exhausted, and the jury still incomplete, it appeared that the names of four persons served on the defendant had not been drawn at all, and it was then found that the names of three of these persons had never been put in the hat at all, and that the fourth one's name had been written on one of the slips which had been drawn, and on the opposite side of which was the name of another person named in the list served on the prisoner. The defendant then moved the court to quash the *venire*, and set aside the panel of jurors already accepted. The court overruled the motion, and defendant excepted."

"The court then ordered the names of the three persons whose names had not been placed in the hat originally, and the name of the one written on the opposite side of a slip already drawn and containing the name of another on the other side, to be placed in the hat and the drawing to proceed to the completion of the jury. To this action of court the defendant excepted. The names of this person was drawn out and accepted by the State and put upon the defendant for acceptance or challenge, and defendant duly excepted. The other three names were drawn and accepted by the State, and put upon the defendant for acceptance or challenge, before the jury was completed. To this action of the court defendant duly excepted. After the jury was complete the defendant moved the court to set aside and quash the panel, which motion was overruled, and defendant excepted. At the time the names originally placed in the hat were found to be exhausted, and before the order was made to place the names of the other four persons in the hat, the State had four peremptory challenges, and the defendant had six peremptory challenges remaining."

The other facts necessary to an understanding of the objections raised in this court will be found in the opinion.

TERRY & WILLETT, and A. J. WALKER, for appellant.  
JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—Henderson Brazier was indicted for murder in the circuit court of Fayette county on the 28th day of September, 1869. The indictment is in the form prescribed by the Revised Code, except it is stated therein that the grand jury “*charged* that before the finding of this indictment *Henderson Brazier* unlawfully, and with malice aforethought, killed Cicero Gregory, by shooting him with a gun or pistol, against the peace and dignity of the State of Alabama.” It is contended that the use of the imperfect tense instead of the present tense of the word *charge* makes the indictment bad, even after a plea to the merits and judgment. In support of this position it is said that the form of words used here is a mere recital of the fact that a certain accusation had been made, and not a direct statement of the facts constituting the offense intended to be charged, as the law requires; and that it is a departure from the form laid down in the Revised Code.—Rev. Code, § 4109, 4112; Rev. Code, appendix, p. 808, No. 2. It is no doubt best, that in all cases where precise forms have been given in the Code, these forms should be followed in practice, but at the same time, if the defect is such an one as could be amended with the consent of the accused, in the court below, and he goes to trial upon the informal indictment, he must be held upon objection, for the first time in this court, to have waived it. This can hardly be said to be bad grammar or bad English which would be amendable, but it seems to me to fall within the reason of the rule in such cases. The common law respects the effect and substance of the matter, and not every nicety of form or circumstance. This also seems to be the statutory interpretation of the rule for the amendment of mere formal defects.—Broom’s Maxims, pp. 298–99, marg; Rev. Code, §§ 4142, 4143, 4128. In this case there was neither a demurrer nor a motion in arrest of judgment. The accused, then, must be held to have waived the defect.—Broom’s Maxims, 58–9, marg.; *Francis v. The State*,

20 Ala. 83 ; 1 Bish. Cr. Proc., § 236 ; *Hastings v. Bolton*, 1 Allen, 529.

The law does not deny to a person the right to be called by two christian names, by either of which he may be known and called, and by either of which he may be indicted.—*The State v. Leroy*, 2 Brev. 395 ; *The State v. Hand*, Eng. 165 ; *People v. Kelly*, 6 Cal. 210 ; *Walden v. Holman*, 6 Mo. 115, S. C. ; 1 Salk. 6. Here the defendant was indicted by the name of *Henderson Brazier*, and he was arraigned and pleaded not guilty to this indictment, by the name of *John H. Brazier*. And in this latter name he applied for and obtained an order for the removal of the trial of the indictment, to which he had pleaded, from the county of Fayette to the county of Sanford. After the trial of this cause was removed to the county of Sanford for trial, it is entitled on the docket of the circuit court of said county of Sanford, “*The State vs. J. H. Brazier*, for murder.” This cause is there continued at the instance of the State, and “the prisoner” is “remanded to the jail of Pickens county, unless he enter into bond,” &c. On the 4th day of April, 1870, the case of “*The State vs. Henderson Brazier*, for murder,” was by order of said circuit court of Sanford county, set for trial on the 7th day of April, 1870, in said last named circuit court, and said *Henderson Brazier* was in court, in his own proper person, at the time said order for trial was made, and he interposed no objection to said order. The trial was had on the day appointed by the order of the court as above stated. The entry of the judgment is in these words :

“The State	}	Indicted for murder of Cicero
vs.		
Henderson Brazier.		
		Gregory.

“This day came Alexander Cobb, solicitor, &c., who prosecutes for the State, and came also the defendant, Henderson Brazier, who is styled and called in some parts of the record in this case by the name of John H. Brazier, in his own proper person and by counsel, and the said defendant having heretofore been arraigned on the indictment in this case, and he having heretofore in his own proper person plead to said indictment that he was not



guilty, of which plea said defendant, in his own proper person, puts himself upon the country for trial, and issue being joined upon said plea, thereupon came a jury of good and lawful men, to-wit, James T. Collins and eleven others, who, being impaneled, sworn, and charged well and truly to try the issue joined, and a true verdict render according to the evidence, on their oath do say—we, the jury, find the defendant guilty of murder in the first degree, and say that defendant shall suffer imprisonment in the penitentiary for life. And the defendant being asked whether he had any thing to say why sentence of the law should not now be pronounced upon him, says nothing. It is therefore the judgment, order and sentence of the court, that said defendant be imprisoned in the penitentiary of this State for life. But, because (a) certain questions of law arising in this case have been reserved for the consideration of the supreme court, by bill of exceptions, duly taken and signed by the presiding judge, it is thereupon considered by the court, that the sentence of the court in this case be suspended until the sixth day of August next, that being sixty days after the commencement of the next ensuing term of said court.

“It is further considered by the court, that the State of Alabama recover of defendant the costs of this prosecution, for which let execution issue.” There was no objection or exception to this judgment.

The indictment upon which this conviction took place, was the same that was found by the said grand jury, of the said county of Fayette, abovesaid, on the 28th day of September, 1869.

The court here must look to the whole record, in order to make up its judgment. If there are irregularities in the record, which the record itself explains, this explanation is sufficient. Then it sufficiently appears by the record, that *Henderson Brazier* and *John H. Brazier* were the same person; therefore, the seeming duplicity of names mentioned in the record was not real, and so far as it constituted an irregularity in the proceedings in the court below, it was cured by the verdict.—*Smith v. The State*, 8 Ohio, 294. The objection, that the record shows error in the removal

of the trial from the county of Fayette to the county of Sanford, is not well taken.

This accusation is a felony ; on conviction, the accused is subject to be punished by death, or confinement in the penitentiary.—Rev. Code, §§ 3541, 3654. In the trial of such offenses the fundamental law of the State secures and guarantees to the accused a trial by jury. The common law import of the word *jury* is twelve men, impaneled, sworn, and charged according to law, and this is the force of the word as used in our constitution.—*Work v. The State*, 2 Ohio St. R. 296 ; *The State v. Cox*, 3 Eng. 436 ; 2 Lead. Cr. Cases, 327, and note ; *Milligan's case*, 4 Wall. 119 ; Story on Const. § 1779 ; *Turns v. Commonwealth*, 6 Met. 224 ; Shaw, C. J. *arguendo*, p. 235 ; *Lamb, et al. v. Lane*, 4 Ohio St. R. 167 ; *Wynehamer v. The People*, 3 Kernan, N. Y. 376 ; *People v. Kennedy*, 2 Parker's Cr. Cas. 312 ; Const. Ala. 1867, art. 1, § 13.

On the trial, in such a case, the statute directs how the jury shall be drawn. This statute confers certain rights upon the accused, which enable him to obtain a fair and impartial trial.—Rev. Code, § 4173, 4177 ; Const. Ala. 1867, Art. 1, § 8. The directions thus given are peremptory. They can not be disregarded by the courts.—*Ex parte Chase*, 43 Ala. 303 ; 3 Chitty's Gen. Pr. 53, 54, 55. The names of the jurors must be written on *separate* slips of paper, and each name by itself, folded or rolled up, placed in a box or some substitute therefor, and shaken together, and then the slips drawn out, one by one, until the jury is completed, as prescribed in the statute. The jury in this case was not drawn as required by law. The accused did not waive the irregularity thus committed. His motion to quash the jury should have prevailed. The court erred in its refusal. For the error thus committed, this cause is reversed and remanded, and a new trial is ordered. In the meantime the appellant, the said Henderson Brazier, will be kept in custody until discharged by due course of law.

## BELL vs. THE STATE.

[PROSECUTION FOR RECEIVING STOLEN COTTON.]

1. *Juror; witness competent as.*—A juror is not incompetent, because he is a witness in the case.
2. *Acquittal; what equivalent to.*—When the jury has been impaneled and sworn, and a sufficient indictment is read and pleaded to by the defendant, the discharge of the jury for any cause legally insufficient is equivalent to an acquittal.
3. *Verdict; what invalid.*—In a criminal case, a verdict rendered by eleven jurors is invalid, notwithstanding the consent of the defendant and the solicitor. Neither the prosecuting officer nor defendant has authority to consent to such a change in the tribunal.
4. *Witness, refusal of to obey order, excluding from court-room; practice to be pursued in such a case.*—When a witness disobeys the order excluding him from the court-room during the examination of witnesses, the better practice, where there has been no misconduct of the party calling him, is to admit his testimony, and punish him for the contempt.

APPEAL from the Circuit Court of Perry.

Tried before Hon. M. J. SAFFOLD.

The facts are sufficiently stated in the opinion.

JOHN C. REID, and W. L. BRAGG, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The appellant was tried on an accusation for buying or receiving stolen cotton of less value than one hundred dollars, knowing it to be stolen. The prosecution was commenced in the county court, and was taken by appeal to the circuit court.

The first error alleged is, that after the jury had been impaneled and sworn, the complaint read to them, and the defendant had pleaded to it, but before any evidence was given, the court, at the instance of the solicitor, and against the objection of the defendant, discharged one of the jurors, because he was shown to be a witness in the case.



A witness is not on that account an incompetent juror in a cause.—Rev. Code, § 4200.

It is claimed that the unauthorized discharge of the juror at the particular stage of the trial was equivalent to an acquittal of the defendant. The prohibition against being put in jeopardy twice for the same offense applies to misdemeanors as well as to felonies. The authorities are not in harmony respecting the precise point in the procedure when the jeopardy begins. Bishop says it is when the jury being full, is sworn and added to the other branch of the court, and all the preliminary things of record are ready for the trial.—Bish. Crim. Law, § 856 (660). Unless the indictment is such that a good judgment can be given on it against the defendant, he can not be in danger. It is on this principle that an indictment may be quashed at any time before the jury retires, and a new one be found. Rev. Code, 4144.

All of the authorities agree that after some evidence in support of the accusation is submitted to the jury, the discharge of the jury, without a sufficient legal reason for doing it, amounts to an acquittal of the prisoner.—*McCaulley v. The State*, 26 Ala. 135; *Cobia v. The State*, 16 Ala. 781; *Ned v. The State*, 7 Por. 213.

In *Nelson's Case*, (7 Ala. 610,) issue had been joined on the plea of the general issue, and also upon a replication to a plea of *autrefois convict*, when the cause was continued by the State and the jury discharged. The prisoner was held to be liable to another trial, on account of previous irregularities which made a discharge of the jury necessary. The court said very serious doubts would be entertained of the power to discharge the jury, simply because the prosecuting officer was not prepared to proceed with the trial. In *Coleman Williams' Case*, (3 Stewart, 454,) the decision was, that an irregular discharge of a juror, before evidence given, would not preclude a subsequent trial.

The weight of authority seems to be, that when the jury has been impaneled and sworn, and the indictment read, and pleaded to by the defendant, as in this case, he is entitled to have the trial proceed to its conclusion. If it is then interrupted by an improper discharge of the jury, or

other insufficient legal cause, he can not be tried again.—*Grogan v. The State*, 44 Ala.

A juror may be discharged on account of sickness, rendering him unable to perform his duty, or for any cause necessary in the opinion of the court. If it is done before the jury retire, his place must be supplied, and the trial commenced anew. If afterwards, the panel must be discharged.—Rev. Code, §§ 4201, 4202.

In a note in Kent's Commentaries, there is an admirable expression of the law in such cases as the present: "It is settled by overwhelming precedent and authority in favor of the power of the court to discharge a jury before verdict, after being charged, in a capital case, when there is an absolute necessity for it, to be judged of by the court in its sound discretion, and that the accused may be put upon his trial *de novo*. And, also, that a new trial, after a verdict of conviction, may be awarded; for the party is not put in jeopardy a second time. That jeopardy already exists, and the only object of a second trial is to give the accused a chance of being relieved from it."—Kent's Commentaries, vol. 2, m. p. 12, note *b*; see, also, Wharton's Amer. Crim. Law, edit. Phil. 1846, pp. 146–155, 625–635.

The objection, that the verdict rendered by eleven jurors is invalid, notwithstanding the defendant consented that one might be discharged for illness, and the trial proceed with the remainder, is well taken. When issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.—*Cancemi v. The People*, 4 Smith's N. Y. R. 128.

The disposition to be made of a witness and his testimony, when he disobeys the order excluding him from the court-room during the examination, is obliged to rest greatly in the discretion of the court. Whether his testimony should be excluded or not, must depend on circumstances. In some cases, to do so would be the just deserts of the party calling him. In others, it would be a great

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hardship. The better course would be to punish him for contempt, and admit his evidence.

It is unnecessary to consider the other assignments of error.

As the prisoner has been in jeopardy, and the jury was discharged for an insufficient cause, an order for his release from custody will be issued from this court.

The judgment is reversed.

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### CÆSAR WILLIAMS *vs.* THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Indictment; when demurrable.*—A count of the indictment in the following words, viz: "The grand jury of said county charge that, before the finding of the indictment, Caesar Williams feloniously took and carried away a certain paper writing, commonly called a cotton receipt, issued by E. M. Byrne & Co., a firm composed of E. M. Byrne and Henry H. Bender, and dated December 4th, 1869, numbered 988, and issued to M. David McDonald for the receipt of one bale of cotton marked [M. D.], and weighing (524) five hundred and twenty-four pounds, of the value of more than one hundred dollars, the property of said M. David McDonald, against the peace and dignity of the State of Alabama," is demurrable, because it is too uncertain whether any value of the property stolen is alleged or not. The allegation of value here may as well apply to the bale of cotton as to the receipt.
2. *Larceny; what charge as to, erroneous.*—A charge of the court that an unlawful taking and carrying away is sufficient to constitute the offense of larceny, is erroneous. The taking and carrying away must be felonious as well as unlawful.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

The facts upon which the decision rests are sufficiently set out in the opinion.

PETTUS & DAWSON, and P. G. WOOD, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.



PETERS, J.—This is an indictment for larceny. There was a demurrer to its sufficiency in the court below, which was overruled. There are two counts, both of which are open to the same objection, if the demurrer was well taken, and we think it was.

The first count, which is similar to the second, is in these words: "The grand jury of said county charge that, before the finding of this indictment, Cæsar Williams feloniously took and carried away a certain paper writing, commonly called a cotton receipt, issued by E. M. Byrne & Co., a firm composed of E. M. Byrne and Henry H. Bender, and dated December 4th, 1869, numbered 988, and issued to M. David McDonald, for the receipt of one bale of cotton marked [M. D.], and weighing (524) five hundred and twenty-four pounds, of the value of more than one hundred dollars, the personal property of said M. David McDonald, against the peace and dignity of the State of Alabama."

In such an indictment the value of the property stolen should be alleged, and upon conviction judgment should be given against the accused for the assessed value of the stolen property, unless it has been returned to the owner. Rev. Code, § 3706, 3708, 3709, *Forms*, p. 812.

This allegation of value should be so certain as to leave it without necessity of inference or argument to show it. It must be patent and evident, upon inspection of the facts constituting the charge.—1 Bish. Crim. Proc. p. 42, § 42. Here it is uncertain whether the value alleged belongs to the bale of cotton or to the receipt. The syntax of the sentence legitimately connects the statement of value with the cotton, or it leaves it doubtful whether this was not the purpose of the pleader. This is not sufficient.

The charge of the court was also wrong. An unlawful taking and carrying away is not enough to constitute larceny; these must be felonious, as well as unlawful. The court did not so charge. The charge was therefore erroneous.

The other questions, mooted on the trial below, may not again arise; their further consideration is therefore postponed until they do arise.

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Wicks v. The State.

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Let the judgment of the court below be reversed, and the cause remanded for a new trial; and, in the meantime, the defendant will not be discharged, except by due course of law.

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### WICKS *vs.* THE STATE.

#### [INDICTMENT FOR BURGLARY.]

1. *Charge of court; what, erroneous.*—In a criminal case, a charge of court, *mero motu*, which needs explanation to rescue it from unfairness, and which is calculated to prejudice the defense of the accused, is erroneous.
2. *Principal and accessories; distinction between abolished.*—In this State, all who in any manner participate in the commission of a burglary, are guilty, without regard to the former distinction of principal and accessories in such offense.
3. *Burglary, indictment for; what sufficient.*—A count in an indictment for burglary, which charges that the accused broke into and entered the store-house of W., "in which goods and merchandise were kept for use, sale or deposit, with intent to steal," is not bad on demurrer, because it is not also alleged that "said goods and merchandise were of any value, or were valuable things."

APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

The facts are sufficiently set out in the opinion.

J. Y. KILPATRICK, and J. McCASKILL, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—The appellant, James Wicks, and six others, were indicted in the circuit court of Wilcox county in this State, at the spring term, 1869, for burglary. There were three counts in the indictment; to each one of which there was a demurrer. The demurrers to the first and third counts were sustained, but overruled as to the second. The second count was in these words;

“And the grand jury of said county further charge, that before the finding of this indictment, Giles Kimbrough, Randal Kimbrough, Adison Kimbrough, Phœbe Kimbrough, Henry Swearingen, James Wicks, and Franklin Madison, broke into and entered the store of John B. Wood, in which goods and merchandise were kept for use, sale or deposit, with intent to steal, against the peace and dignity of the State of Alabama.”

The cause of demurrer is, that it was not averred in said count of said indictment, “that said goods and merchandise were of any value, or were valuable things.”

Upon this demurrer being overruled, issue was joined upon the plea of not guilty. And on Wicks' motion the court permitted a severance on the trial below, and Wicks was tried alone, and convicted and sentenced to the penitentiary for two years. From this conviction Wicks appeals to this court.—Rev. Code, § 4190.

The second count of this indictment was sufficient. The allegation charging the offense is strictly in accordance with the language of the statute, and the form of statement is in compliance with that laid down in the Revised Code.—Rev. Code, § 3695; *Forms*, No. 35, p. 811. It has been repeatedly held by this court, that such an indictment is sufficient.—*Mason et al. v. The State*, 42 Ala. 543; *Gabriel v. The State*, 40 Ala. 357.

On the trial, the accused offered evidence tending to show that he had not been present at the commission of the offense, and that he had not aided or abetted in its commission. There was some proof offered, tending to show that he had confessed his guilt before the committing magistrate. But the only certain proof on the facts of the commission of the offense was, that a portion of the goods taken from the store were found concealed in Wicks' possession, on the Monday after the store had been broken into on the Saturday night before. There was proof tending to show that the goods thus found had been received by Wicks from the parties who had taken them from the store, some time after they had been so taken. There was no evidence except the bare possession of the goods, and an equivocal confession before the magistrate, that Wicks



knew when the goods were taken, or that they had been stolen at all. It was shown that the goods had been taken by the other parties, who had been indicted along with Wicks, on the Saturday night before a portion of the goods were found in the possession of Wicks. The bill of exceptions contains all the testimony given on the trial.

Upon this testimony, the court charged the jury, "that the fact that the defendant had possession of the goods taken from Woods' store, and that a part were found concealed, is evidence of the fact that he did not come by the goods honestly, and the jury can look to that fact in determining the question of guilt under the present indictment, unless satisfactorily explained." This charge was objected to and exception reserved.

The defendant then asked the court to charge the jury, that if they "believed from the evidence that the defendant received some of the goods taken, on the night of the burglary, from Randal Kimbrough and Henry Swearingen, even though he may have known that they were stolen, he could not be convicted on this indictment." This was refused, and the defendant excepted.

The defendant then also asked the court to charge the jury, that they "must be satisfied from the evidence, beyond all reasonable doubt, that the principals, Randal Kimbrough and Henry Swearingen, are guilty, before they can find the defendant, Jim Wicks, guilty of aiding and abetting in the commission of the offense charged." This charge the court refused, and the defendant excepted.

The charge of the court must be referred to the testimony upon which it is based, in order to determine its correctness.—*Notes v. The State*, 26 Ala. 31.

In this case the statute law has abolished all distinction between principals and accessories before the fact of the commission of the offense, and between principals in the first and second degree. Such persons are now all guilty and punishable in the same degree.—Rev. Code, § 4129. The testimony must show an actual participation in the commission of the offense, else the party charged can not be convicted under this statute. Breaking into the house with intent to steal is the *gravamen* of the offense. It is not

required that there shall be a theft committed. The recent possession of stolen goods, without an explanation of such possession, necessarily implies a connection with the felonious taking. And such taking must be referred to the deposit where the owner left his goods. If these were left in a house, and the house is found broken into and entered and the goods taken away, and the goods, or a portion of them, found with the accused and concealed, this connects his possession with all the facts that reasonably lead back to the original taking. Then, if there was no other testimony in favor of the accused except the possession of the goods after the house had been found broken and entered, he might be convicted upon such testimony alone. But here, there was other testimony, which tended to show that the store had been broken and entered by Kimbrough and Swearingen, and the goods taken by them delivered some time afterwards to Wicks, the appellant. The charge of the court was calculated to ignore this latter testimony and to mislead the jury. Such charges are improper and erroneous. Such a charge authorizes the jury to draw an inference opposed to a material portion of the testimony in the cause. This is calculated to strengthen one portion of the testimony against the accused at the expense of another portion, in his favor. This is calculated to bring about a conviction under a state of facts altogether doubtful and uncertain. A charge of the court, *mero motu*, which needs an explanation to rescue it from unfairness, and is calculated to prejudice the defense of the accused, is erroneous.— 23 Ala. 17; *Cary v. Hughes*, 17 Ala. 388; *Dunlap v. Robinson*, 28 Ala. 100; *Stanley v. Nelson*, 23 Ala. 514; *Holmes v. The State*, 23 Ala. 17; *Leoni v. The State*, January term, 1870.

The first charge asked and refused was properly denied. When referred to the whole testimony in the case it was incorrect. It rested the defense on a part of the testimony only. It denies the proof of a confession of guilt any effect whatever. If the accused had been shown to have had no connection with the breaking into the store and the original taking of the goods, then he could not have been convicted under this statute. The charge asked assumes

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Ex parte Bryan.

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this view of the evidence. But the evidence in fact goes further. It tends to show a confession of guilt in addition to the possession of a portion of the goods. Such a charge was calculated to mislead the jury. It was therefore properly refused.—*Solomon et al. v. The State*, 28 Ala. 83.

The third charge, which was the second one that was refused, should not have been given. It has reference to a condition of the law that does not now exist in this State. The distinction between principals and accessories in this offense is now abolished by the Code. All are principals who in any way participate in the commission of the offense. Rev. Code, §§ 4129, 3541, 3695 ; 42 Ala. 543, *supra*.

The judgment of the court below is reversed, and the cause is remanded for a new trial. The defendant will be detained in custody until discharged by due course of law.

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### EX PARTE BRYAN.

[APPLICATION FOR MANDAMUS TO COMPEL CIRCUIT COURT TO VACATE AND SET ASIDE ORDER FOR CHANGE OF VENUE.]

1. *Accused; right of to be present during prosecution.*—In all criminal prosecutions in the courts of this State, the accused has the right to be heard by himself and counsel, or by either, and for this purpose he must be present in court, whenever any action is taken in the prosecution, for the purpose of allowing him to be heard, should he desire it, except when orders are made for a continuance, when accused fails to appear, or of a like character, which are governed by the discretion of the court.
2. *Same; what order can not be made in absence of.*—An order for the removal of the trial, in a criminal case, from the county in which the indictment was found to the nearest county free from objections, can not be made in the absence of the accused from the court; on the making of such an order he is entitled to be present, and to be heard if he sees fit.
3. *Mandamus; when lies.*—A mandamus will be awarded to set aside an order made for a change of venue, in a criminal case, in the absence of the accused.



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Ex parte Bryan.

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This was an application, by Harry Bryan, to this court for a *mandamus*, to compel the circuit court of Elmore, Hon. J. Q. Smith, judge presiding, to vacate and set aside an order, made by said court, transferring the trial of the case of *The State vs. Harry Bryan*, on an indictment for burglary, to the county of Montgomery. The petitioner alleges that said order was made, when neither petitioner nor his counsel was personally present.

At a former term of the circuit court of Elmore, the petitioner made an application for a change of venue, for causes set out in his affidavit; on the hearing "it was admitted by the counsel for the State, and defendant, that the court-house of Montgomery county was the nearest court-house. It was also stated that Montgomery county was the nearest county free from exceptions. It was also stated that Autauga county, the court-house of which is only five miles further than the Montgomery court-house, is also free from exceptions, and the county solicitor proposed that the trial take place in Autauga county." On this evidence the court ordered the venue to be changed to Autauga county. To this ruling of the court Bryan excepted, and brought the case by appeal to this court. This appeal was dismissed at the June term, 1869, of this court, the court holding that an appeal, before final trial on the indictment, would not lie to revise the ruling of the circuit court on an application for a change of venue.—See *Bryan v. The State*, 43 Ala. 321.

Afterwards, upon the matters set out in the transcript, an application was made for a rule *nisi* for *mandamus* to the circuit court of Elmore, to show cause why the order changing the venue to Autauga county should not be vacated, and the trial of the case should not be transferred to Montgomery county. The application was granted, and a rule *nisi* granted, in accordance with the prayer of the petitioner. The return to the rule *nisi* is not among the papers or transcript in the case, and the Reporter is unable, therefore, to state any thing more definite in relation to it than is already stated in the opinion.

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Ex parte Bryan.

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SAMUEL F. RICE, for petitioner.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—The petitioner, Harry Bryan, comes here upon his petition, and moves this court for a writ of *mandamus*, or other appropriate writ or order, to compel the circuit court of Elmore county to set aside an order for a change of venue, in the case of *The State vs. said Harry Bryan*, upon a charge of burglary, made in the said circuit court, at the spring term, 1870, by which the trial of said case had been removed to the county of Montgomery, in this State, under direction of an order *nisi* for an alternative *mandamus*, issued out of this court at the last term, on an application for *mandamus* in this court, at said last term thereof.

The ground for this application is, that said order for the removal of the trial of said cause, of *The State vs. Harry Bryan*, abovesaid, to the county of Montgomery, was made by said circuit court, when said Bryan was absent from said circuit court, and was neither present to be heard by himself and counsel, or by either; and that said order was, therefore, erroneous for this reason.

In many cases under the practice of this court, as heretofore established, the writ of *mandamus* has been made, to some extent, to serve as a writ of error, or an appeal in certain specified cases, in which a party, without its aid, would suffer an irreparable injury by the denial of an important right. Such, it is contended, will be the effect in this case.

The constitution of the State is a pledge of protection to the rights it secures to every citizen. This instrument requires—"that in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either." Constitution of Ala. 1867, art. 1, § 8. The import of the word *prosecution*, in this section of the fundamental law, is to carry on or accompany a criminal suit in the courts of the State, from the beginning to the end of the procedure. Such is the legal, as well as the etymological force of the word. Then, in every step of the proceeding, which constitutes the prosecution, in which there is any action in

which the accused has a right to be heard, he has the right to be present and to be heard by himself and counsel, or either. This right is without any limit, and without any exception, when the step is not one of mere discretion in the court; such as a continuance, when the accused fails to be present, and orders of a like character. This is a constitutional provision in his favor, and cannot be disregarded by the court. The court is bound by the most solemn obligation to support and defend it.—*The State v. Hughes*, 2 Ala. 102, 104; *Henry v. The State*, 33 Ala. 389; *Hall v. The State*, 40 Ala. 698; 1 Bish. Cr. Proc. p. 684; Const. Ala. art. 15. Then the circuit court erred in making the order to remove the trial of the case of *The State vs. Bryan*, to the county of Montgomery, without the presence of the accused in court, to be heard upon it, if he chose. Rev. Code, § 4206, 4207; *Ex Parte Chase*, 43 Ala. 303; *Bryan v. State*, 43 Ala. 321, 323. This was such an order of the court as could not have been corrected, if wrong, by appeal, but only by *mandamus*.—*Bryan v. State*.

No doubt that a party, after making an application for a removal of the trial to another county, may abandon it, or may have it rescinded before the trial is actually removed, as he could any other interlocutory order, during the term of the court at which the same was made, before its adjournment.

The learned judge, under the order of this court, would have acted very properly in making the order for the removal of the trial to the county of Montgomery, had the accused been in court by himself and counsel, or either, to have been heard upon the order when it was made. The error was not committed in sending the case to Montgomery county, but in making the order in the absence of the accused from the court.

The answer of the learned judge of the circuit court to the order *nisi* of this court, would be sufficient if it showed that the order of this court had been complied with, or that the accused had abandoned his application for the removal of the trial, and consented to be tried in the county where the indictment was found.

A rule *nisi* is therefore granted, according to the prayer



of the petitioner, requiring said order, removing said trial to the county of Montgomery, made in the absence of the prisoner from court, to be set aside; returnable to the next term of this court, on the first regular motion day thereof.

### ESLAVA *vs.* THE STATE.

[INDICTMENT FOR BETTING AT A GAME CALLED "KENO."]

1. *Lotteries, act to regulate; what does not authorize.*—The act to regulate lotteries in this State does not authorize the commissioner of lotteries to issue licenses for the establishment of lotteries, or such enterprises in this State. Lotteries, and enterprises in the nature of lotteries, can only be established by law.
2. *Same; "keno," not within the meaning of.*—The game called "keno," although a game decided by lot or chance, is not a lottery under the act to regulate lotteries; and to bet at it, in this State, is forbidden by statute, and is punishable as a crime.—Rev. Code, § 3622.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

This was an indictment under section 3622 of the Revised Code, for betting at a game called "keno," &c. The defendant went to trial on plea of "not guilty," was found guilty, and sentenced to pay a fine of \$50 and the costs of the prosecution.

On the trial, the State having proved the buying of a ticket, and the betting at "keno," by the defendant, in the month of February, 1870, and the manner in which said game was played, the defendant offered in evidence the following paper or "license:"

"State of Alabama,	}	No. 6.	\$100.
Montgomery county.			

D. C. Whiting having made application to me for a license under section 7 of the

act entitled "an act to regulate lotteries, approved Dec. 31st, 1868, and having paid one hundred dollars, for the county of Mobile, for the month of February, 1870, the same is hereby granted, this 18th day of January, 1870.

"H. S. WHITFIELD,

"Comm'r of Lotteries."

Which, it was admitted, was issued by Whitfield, who was admitted to be such commissioner, duly sworn, commissioned, &c.

The defendant then offered to prove by one of the clerks, who managed said business and had the license above set out, who he was acting for, and what the "gentleman running the game" said to him at the time of his employment as to his authority to employ a clerk in the business. The defendant stated that, in connection with said license, he proposed to prove that the person from whom the ticket was bought was the agent of said D. C. Whiting, &c. On the motion of the state, the license and proffered evidence as to declaration of the employer in hiring the clerk, and testimony of the clerk as to whom he was employed by, were not permitted to go to the jury, and defendant excepted.

The defendant then offered to show that the game called "keno" was formerly known as "lotto" or "loto" and was identically the same, and that the game of lotto was a species of lottery, and offered to read a definition of the word "lotto" from a large dictionary, which he proved was a standard dictionary of the French language in France, and then considered as authority, said definition being as follows: "Loto, subs. mas. (loto)—*espece de jeu ressemblant a une loterie, et qui se jou avec quatre-vingt-dix numero et autant de boules,*" the interpretation of which was proven to be "loto,—subs. masc. (loto) a kind of play resembling a lottery, and which is played with ninety numbers and as many balls." He also introduced the definition of the word "loto," as found in Webster's dictionary, &c.

This was substantially all the evidence. The court charged the jury, "if they believed the defendant had bought a card or ticket in any game of "keno," and played at the game in the manner shown, in the last twelve months before the finding of the indictment in the county of Mo-

bile, State of Alabama, they should find him guilty, and if they should find him guilty, the punishment was a fine of not less than fifty, nor more than three hundred dollars.

Defendant excepted, and now assigns the charge of the court, and the various rulings to which exceptions were reserved, for error.

J. LITTLE SMITH, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—The indictment in this case is in the following words :

"State of Alabama,	}	City Court of Mobile,
Mobile county.		February term, 1870.

"The grand jury of said county charge, that before the finding of this indictment, J. Eslava bet at a gaming table for gaming, or at a game called keno, "against the peace and dignity of the State of Alabama."

The defendant, Eslava, went to trial on this charge upon a plea of not guilty, and was found guilty by the jury, and fined fifty dollars, and taxed with the costs. From this conviction he appeals to this court.

The proofs show that, beyond all doubt, the appellant bet at a game called keno, within the twelve months next before the finding of the indictment.

This is not denied ; but it is insisted that this game is licensed as a lottery by the State, and because of this license the accused can not be punished ; in effect, that the license repeals the law forbidding the betting on this game.—*The State v. Allaire*, 13 Ala. 435, 436.

But is keno a licensed game? Certainly not. It is forbidden by the statute and it is an offense to bet at it.—Rev. Code, §§ 3616, 3622, 3623.

Notwithstanding this, it is contended that it is within the description of lottery under the act "to regulate lotteries." Pamph. Acts 1868, p. 529, Act No. 185, § 10.

Should this be admitted, it does not help the appellant's case. The lotteries referred to in this act are only such lotteries as "are now authorized, or may hereafter be authorized by law in this State."—Pamph. Acts 1868, p. 529,



Act No. 185, §§ 1, 2, 6, 11. The legislature is the only power that can give such authority. It requires a law to authorize a lottery, and the general assembly alone can make this law.—Const. of Ala. 1867, arts. 3, 4. The honorable commissioner of lotteries can only take charge of such lotteries, “associations, companies, societies, gift enterprises, and other enterprises in the nature of lotteries,” as have been or shall be hereafter authorized by law, and see that they observe the requisitions of the statute for their regulation. He has no power to authorize a lottery by his license, or to turn the game called “keno” into a lottery, or into an “enterprise in the nature of a lottery,” His license, then, as a matter of defense in this case, avails nothing. It was issued without authority of law, and is worthless for any purpose whatever. The evidence tending to establish its existence was, then, properly excluded from the jury; and without this the accused showed no matter of defense in the court below. For this reason the ruling and the charge of the court below, which are alleged as error, were correct.

The conviction in the city court is therefore affirmed, with costs. The defendant will be discharged upon complying with the judgment of the city court, else retained in custody until discharged by due course of law.

## WHITE vs. THE STATE.

[INDICTMENT AGAINST DEPUTY SHERIFF FOR DISCLOSURE OF INDICTMENT.]

1. *Indictment under § 3577 of Revised Code; when sufficient.*—An indictment, under § 3577 of the Revised Code, for “disclosure of indictment by officer of court or grand juror,” is sufficient if it pursues the form of the statute, and is in form analogous to the forms prescribed in the Revised Code.
2. § 3577 of Revised Code, deputy sheriff; “officer of court” within meaning

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of.—A deputy sheriff is an "officer of court," within the meaning of § 3577 of the Revised Code.

3. *Same; what necessary to convict under.*—The intent to disclose must accompany the act of disclosure, in order to justify a conviction under said section. (SAFFOLD, J., dissenting, held, that there was no error in refusing the second charge, and that the judgment should be affirmed.)

APPEAL from Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

The facts of the case are fully stated in the opinion.

JOHN WHITE, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—The appellant, White, was indicted at the fall term, 1888, of the circuit court of Dallas county, under § 3577 of the Revised Code of Alabama. There is but one count in the indictment, which is in the following words:

"The grand jury of said county charge that, before the finding of this indictment, Hamilton White, who is deputy sheriff of Dallas county, and being then and there such deputy sheriff and an officer of court, disclosed the fact that an indictment had been found by the grand jury of said county against one William Gill, before the said William Gill had been arrested, or given bail for his appearance to answer thereto, against the peace and dignity of the State of Alabama."

There was a demurrer to this indictment, which was overruled.

Indictments under our Code are *sui generis*. It will not do to apply to them the rules for the construction of indictments at common law. According to our system, a public offense is an act or omission forbidden by law, and punishable as prescribed in the Code. The law, then, defines what acts, or omissions to act, shall be a public offense.—Rev. Code, § 3550, *et seq.* An accusation in writing, presented by the grand jury to the court as a true bill, charging a person with having committed the act, or omission to act, which the law denounces as an offense, is a

sufficient indictment.—Rev. Code, § 4109; Sheph. Dig. p. 71, § 5, *et seq.* This charge may be in the language of the statute, or in words conveying the same meaning, or if it be a common law offense, it may be charged as at common law.—Rev. Code, § 4119, 4120. The indictment in this case fully comes up to these requisites. It is therefore sufficient, and the circuit court did not err in refusing to quash it on demurrer.

After the demurrer was disposed of, the accused went to trial before a jury, who found him guilty, and assessed a fine against him of two hundred dollars. Upon this verdict the court gave judgment against the accused for the fine, thus assessed, and for costs. This judgment is in the usual form. From this judgment the appellant brings the case to this court by appeal.

On the trial in the court below, it is shown by a bill of exceptions, taken by appellant, that the State introduced testimony tending to show that one Gill was indicted in the circuit court of Dallas county for murder, at the fall term, 1866, of said court; that a *capias* was regularly issued on said indictment, and put in the hands of the sheriff of said county for execution. This was done on the 25th day of July, 1868; and afterwards, the accused, "some time in the latter part of the summer, or first of the fall of the year 1868," was in the town of Cahaba, when he asked the witness, who was testifying, if he knew said William G. Gill; thereupon, witness told the accused where Gill lived, and how to go to his house, and accused then exhibited to witness a *capias* for the arrest of Gill. A *capias* was shown to the witness, and he thought it the same which had been exhibited to him upon the occasion mentioned as abovesaid. This paper disclosed that said Gill was indicted for murder. After this disclosure, the accused came back to witness and requested him not to say any thing about the exhibition of said *capias*. While in Cahaba, on the occasion above mentioned, the accused, as deputy sheriff, was making arrests there, as such deputy sheriff, on *capiases*. It was also proved, that at the time mentioned above, the said accused was acting as deputy sheriff of said county. It was also shown, that said Gill was not arrested



upon the *capias* abovesaid, which had been exhibited, but was subsequently arrested on another writ. The bill of exception states that "this was all the evidence in the case."

Upon this testimony the appellant, the defendant in the court below, asked three charges. The second was in these words :

"If the jury find that whilst defendant's intention was to get information by which he could arrest Gill, he was not guilty." This charge was refused, and defendant excepted.

The third charge was given as asked, and then qualified by a more general charge, covering the same ground. It was as follows, with the qualification appended :

"That a juror's knowledge, that Cahaba is in Dallas county, is not evidence upon which they can act, unless the juror proves it as a witness on the stand."

The court gave this charge, but, in explanation thereof also instructed the jury, "that if they believe, beyond a reasonable doubt, from all the evidence in the case, that said disclosure was made by the defendant in Dallas county, then the State has made out the case, so far as the venue is concerned."

It does not appear that this explanation was excepted to by the accused.

The propriety of the second charge will be first considered.

The statute upon which the indictment is founded, is an important law, and its strict observance is a very necessary duty, imposed upon *all* "the officers of court." It is in these words :

"Any judge, solicitor, clerk, or other officer of court, or any grand juror, who discloses the fact that an indictment has been found, before the defendant has been arrested or has given bail for his appearance to answer thereto, is guilty of a misdemeanor, and must, on conviction, be fined not less than two hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months."—Revised Code, § 3577.

Although the language of the second charge is somewhat obscure, and may not be correctly copied into the transcript, yet, when referred to the evidence, enough appears to show that it was designed to raise the question of *intent*, which was necessary, in connection with the act of disclosure, to constitute guilt. Construing the charge in this light, there can be no doubt that there must exist an intention to disclose, as well as an act to disclose, the fact of the finding of the indictment, before there can be a conviction under this statute.—1 Bish. Cr. Law, § 365, 370, pp. 203, 206, *et seq* ; 1 Russ. Cr. p. 48, marg. *Actus non facit reum, nisi mens sit rea*.—3 Greenleaf's Ev. § 13 ; Broom's Max. p. 211, § 226. But the intention with which an act is done, may be inferred from the act itself. And as no sane person is presumed to act without intention, it is permissible to look to the act to interpret the intention ; otherwise the intention, which is most usually secret, could not be discovered.—3 Greenleaf's Ev. § 13, 14. Here there was an attempt to show that there was an excuse for the disclosure ; that it was not intentionally made. This proof was competent, and the charge asked was properly based upon it. It ought, therefore, to have been given. The court erred in its refusal.

The third charge was not refused, and the explanation appended to it was not excepted to. It does not present any question for review in this court.—Rev. Code, § 4302, 4314.

The deputy of the sheriff of the county, is an officer of court, and as such he is liable to indictment, under section 3577 of the Revised Code.—Rev. Code, § 817 ; *Kavanaugh v. The State*, 41 Ala. 399 ; 17 Ala. 426.

The judgment of the circuit court, from which this appeal was taken, is reversed, and a new trial is ordered in the court below. The defendant, who is the appellant in this court, will be held in custody until discharged by due course of law.

B. F. SAFFOLD, J., (*dissenting*.)—The charge refused, for which the judgment is reversed, is too imperfectly expressed in the transcript to convey any definite idea of

its meaning. If we intend (the only interpretation which seems to be permissible,) that the defendant was not guilty, if his intention in exhibiting the *capias* to the witness was to get information by which he could arrest the accused, it was properly refused. It asserts the proposition, that the intention to get information by which he could arrest the party indicted would avoid the offense, no matter how carelessly, or unnecessarily, or even willfully, he exhibited the *capias*, or conveyed the information that an indictment had been found.

### JOHNSON *vs.* THE STATE.

[INDICTMENT FOR DISTILLING VINOUS OR SPIRITUOUS LIQUORS WITHOUT LICENSE.]

1. *Indictment; when defective.*—An indictment which charges that the defendant “did distill vinous or spirituous liquors without license and contrary to law,” fails to allege a violation of the revenue act of 1868, requiring a license for engaging in or carrying on certain occupations.
2. *Occupation or vocation; what necessary to constitute.*—To constitute occupation or vocation, some time during which it is prosecuted is a necessary ingredient. It need not be protracted, but must not be momentary. The intention of the party must govern, and this must be ascertained by the jury.
3. *Indictment jointly for same offense; when no conviction can be had under.* Where two persons are jointly indicted for the same offense, if the proof shows the commission of the offense severally, by each, there can be no conviction of either or both.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

The indictment in this case charged, “that before the finding of this indictment Thomas Crew, and Turner Johnson, did distill vinous or spirituous liquors without license and contrary to law, “against the peace,” &c.

Section 111 of revenue act of 1868, is as follows:



"Sec. 111. Be it further enacted, that any person, who, after the third Monday in March, in 1869, shall be engaged in, or carry on any business or profession, or do any act, for the doing, prosecuting or carrying on of which, a license is by law required to be taken out, without having paid for and taken out such license, shall be deemed guilty of a misdemeanor, and shall be fined three times the amount of such license, and may be confined in the county jail not exceeding one year, at the discretion of the court." By sub-division 7 of section 112 of the same act, a license of \$25 is required for distillers of spirituous liquors.

On the trial, the defendants demurred to the indictment: 1st, because it fails to charge that the defendants carried on or were engaged in the business or vocation of distilling; 2d, that it fails to charge that the defendants were distilling as an employment; 3d, that it fails to charge that the distilling was done since the 3d Monday in March, 1869; 4th, that it fails to charge any offense against the laws of the State. The demurrer was overruled, and defendants excepted.

The defendants then pleaded "not guilty," and the case was put to the jury. The State then proved, that in August, 1869, in said county of Barbour, the defendant, Johnson, distilled some peaches sent to the still at the instance of defendant, for which Johnson received one-third of the brandy and \$2 per day while engaged in distilling the same. The "still" used was an old one, "long disused," and at the time the distilling was done, Johnson, who was a farmer, had laid by his crop. As soon as cotton-picking time came, he ceased distilling and went to work on his crop. The time Johnson was engaged in distilling was five days. Johnson was engaged in the business of farming during the whole of the year 1869, and the distilling occurred when there was no farm work to be done. The "still" used was an old one, which had been on the land for several years; it was not repaired by defendants, or in any manner used by them except in the five days mentioned. This was all the evidence.

The defendants requested the following charges, in writing; 1. "That unless the evidence satisfies the jury that

the defendants, Johnson and Thomas Crew, engaged jointly in the business, or jointly carried on the business of distilling, without having taken out and paid for a license, then the defendant Johnson can not be convicted;" 2. "That unless the evidence satisfies the jury, beyond a reasonable doubt, that the defendant Johnson carried on the business, or engaged in the business of a distiller, without first having taken out and paid for a license, then the defendant, Johnson, can not be convicted;" 3d. "That if the proof shows the distilling in one instance, or in two or three instances only, unless it shall amount to engaging in or carrying on the business of a distiller, then the defendant, Johnson, can not be convicted." The court gave the second and third charges, and refused to give the first charge. To the refusal to give the first charge, defendant excepted. The jury found a verdict of not guilty as to the defendant Crew, and of guilty as to the defendant Johnson.

The errors assigned are—overruling the demurrer to the indictment; refusing to give the first charge asked.

JOHN A. FOSTER, and SEALS & WOOD, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The indictment charged that the defendant "did distill vinous or spirituous liquors without license, and contrary to law." The offense is, engaging in, or carrying on, a business for which a license is required, without first obtaining the license.—Acts 1868, p. 330, § 111. When a new offense, unknown to the common law, is created by statute, its constituents, if specified in the act, must be embodied in the charge.—*Eubanks v. The State*, 17 Ala. 181. The indictment failed to charge an offense.

The second and third charges asked by the defendant, and given, correctly express the law of the case. A distiller is one whose occupation is to extract spirit by distillation.—(Web. Dic.) To constitute occupation some time is a necessary ingredient. It need not be protracted, but must not be momentary. The intention must govern, and must be ascertained by the jury. If the profit is the inducement, a very little time will suffice.

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It was not necessary to prove both of the defendants guilty in order to convict one, but as they were jointly indicted, if the proof had shown only the commission, by each, of a separate offense, a verdict could not have been rendered against either, or both.—*Elliott v. The State*, 26 Ala. 78. The charge refused was irrelevant, as no testimony was introduced tending to implicate the defendant Crew.

The judgment is reversed and the cause remanded.

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### EX PARTE VAUGHAN.

[APPLICATION FOR BAIL, AFTER REFUSAL BY JUDGE OF CITY COURT.]

1. *Murder, indictment for; presumption in relation to prisoner on application for bail.*—On an application for bail by a prisoner, who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof.

This was an application to the court by Fielding Vaughan for bail, the same having been refused by the judge of the criminal court of the county of Dallas. The facts, which were agreed on in the court below, are all set out in the opinion.

JOHN WHITE & JOHN T. MORGAN, for petitioner.  
JOSHUA MORSE, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The evidence in the case is the record of the indictment for murder, and a statement of facts agreed to by the prisoner, as follows :

The killing occurred in Dallas county, on the 2d of April, 1865. The prisoner is a white man, and the person slain was a colored man, occupying the status at that time of the



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colored people of the State, who were heretofore slaves, but are now free.

We do not desire to commit ourselves against any defense which the prisoner may deem available to him on his trial, but we would be loth to hold that there had been any time, in the history of the State, when the crime of murder was not amenable to the civil law.

The prisoner offered no evidence in his own behalf, while against him were the finding of the grand jury, and his admission that he did the killing.

On an application for bail by a prisoner, who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof.—Hurd on Habeas Corpus, 438-446.

The application is denied.

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### MARTIN vs. HEWITT.

[BILL IN EQUITY TO ENJOIN SALE OF LAND OF COMPLAINANT, UNDER EXECUTION ON JUDGMENT RENDERED IN 1862, AGAINST HIS VENDOR, AND TO REMOVE CLOUD FROM TITLE ATTEMPTED TO BE CREATED BY SUCH JUDGMENT AND LEVY OF EXECUTION, AND FOR GENERAL RELIEF.]

1. *Foot-note, omission of, to bill in chancery ; effect of.*—The omission of a note, at the foot of a bill of complaint, required by the 10th rule of chancery practice, is a good cause of demurrer ; but it is an amendable error, and does not go to the merits of the case, and on sustaining a demurrer for that cause the bill ought not to be dismissed, but the complainant should be permitted to amend on terms.
2. *Same ; when omission of, will be held to be waived.*—If a defendant, notwithstanding such an omission, files a full answer, with a demurrer for that cause, and then goes to a final hearing on the bill and answer and an agreed state of facts, he will be held to have waived the error, and will not be permitted to take advantage of the defective character of the bill, either on the hearing, or on appeal.
3. *Judgments rendered during the war, by rebel courts ; effect of.*—Judgments rendered by the courts of the rebel government of this State, during the rebellion, created no liens upon the property of the defend-

ants to such judgments, which, in the absence of legislation, can be recognized and enforced by the courts of the present State government.

4. *Same*.—Such judgments can stand upon no higher grounds than foreign judgments, and constitute mere causes of action, and can only be enforced by the law of comity, and in actions brought for that purpose. The justice of such judgments may be impeached, and it may be shown that they were irregularly or unduly obtained.
5. “*Act to regulate judicial proceedings*,” approved Dec. 10, 1861; *unconstitutionality of*.—The act of the rebel legislature entitled “An act to regulate judicial proceedings,” approved December 10, 1861, was invalid,—1st, because it was in violation of public policy; and 2d, because it impaired the obligation of contracts.
6. *Same*; *no liens created by*.—Said act being unconstitutional and void, the liens created by it could not be preserved or continued in force by subsequent legislation for that purpose.
7. “*Act for the protection of bona fide purchasers, for a valuable consideration*,” approved Oct. 10, 1868; *constitutionality of*.—The act entitled “An act for the protection of *bona fide* purchasers for a valuable consideration,” approved October 10th, 1868, is not in conflict with section 2 of article 4 of the constitution of this State, which declares that “each law shall contain but one subject, which shall be clearly expressed in its title;” nor is it in conflict with part 1, § 10, art. 1, of the constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.
8. *Lien created by mere act of legislation*; *has none of the properties of a contract*.—A lien created by mere act of legislation has none of the elements or properties of a contract, and, therefore, may be destroyed by an act of legislation.
9. *Chancery, jurisdiction of*; *what sale will enjoin*.—A court of chancery will interpose and prevent a sale under an execution in behalf of a *bona fide* purchaser of real estate for a valuable consideration, when the purchase was made after the rendition of the judgment, on which the execution was issued, but before the delivery of an execution upon the judgment to the sheriff of the county where the property is situated.
10. *Same*.—Such a sale, if permitted to be made, would be a cloud upon such purchaser's title, and as there is no remedy at law to prevent such a sale, or to remove the cloud that would thereby be brought upon his title, a court of chancery will, on his application, exercise its preventive jurisdiction and perpetually enjoin a sale under an execution, in such a case, and thereby quiet his title.

APPEAL from the Chancery Court of Montgomery.

Heard before Hon. A. C. FELDER.

All the facts upon which the decision is based are fully set out in the opinion.

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CHILTON & THORINGTON, for appellant.

WATTS & TROY, and JOHN G. FINLEY, *contra*.

[The briefs in this case did not come into the Reporter's hands.]

PECK, C. J.—1. The bill of complaint does not waive the oath of defendant to his answer, as may be done by section 3328 of the Revised Code, nor has it any note in writing at the bottom of the bill, as to the particular statements or interrogatories, by number, which the defendant is desired to answer.

Notwithstanding this omission, the defendant, the appellant in this court, proceeded to make a full answer, and then, at the end of his answer, demurs to the bill, and, with other causes of demurrer, assigns the following, to-wit: 1st. That the bill contains no equity; and, 2d, that it does not conform to the 10th rule, prescribed for practice in the chancery court.

Afterwards, the defendant moved the court to dismiss the bill for want of equity, and to dissolve the injunction on the denials of the answer. On the hearing of this motion it was overruled, and without any further disposition of the demurrer, as far as the record shows, an amendment to the answer was agreed upon and filed, and then it is stated that the parties submitted the cause for a final decree, on an agreed statement of facts. The decree, itself, says: "This cause is submitted on the bill, answer as amended, and on an agreed state of facts."

The court decided that the plaintiff, the appellee, was entitled to relief, and thereupon perpetuated the injunction, granted on the filing of the bill, enjoining the defendant from levying upon or selling the land mentioned and described in plaintiff's bill of complaint.

From that decree the defendant appeals to this court, and assigns for errors: 1st. Refusing to dismiss the bill for want of equity. 2d. In not sustaining the demurrer to the bill. 3d. In the final decree. 4th. Taxing the defendant with the costs.

The first point made and argued by appellant is, that



there is no note at the bottom of the bill as to the particular statements or interrogatories to be answered by defendant, as required by the 10th rule of practice in the chancery court.

In the case of Mary E. and Joseph S. Winter *vs.* Quarles and Wilson, adm'rs, at the June term, 1869, it is said a bill is demurrable, if it omits the note at the bottom thereof, as required by the said rule of practice; and in the case of Mary O'Neal *vs.* Robinson, decided at the same term, it is held that the note at the bottom of a bill is necessary to give it completeness, and in the absence of such note a decree *pro confesso* has not the force of evidence against the defendant.

The failure, however, to comply with this rule of practice is an amendable error, and on sustaining a demurrer for that cause the court should not dismiss the bill, but permit the plaintiff to amend on terms. It is a mere error of practice, and does not touch the merits or equity of the bill, and may be waived by the defendant, by making a full answer, and, as in this case, going to a hearing on an agreed state of facts, without saying any thing as to the defective character of the bill, in omitting the note at the foot thereof.

2. This objection being disposed of, brings us to the consideration of the questions arising on the facts agreed upon by the parties.

The bill of complaint is in the nature of a bill *quia timet*, and seeks to enjoin the defendant from levying upon and selling certain lands described in the bill, under an execution issued on a judgment recovered by defendant in the county court of Montgomery county, in September, 1862, against one James Porter, for six thousand and odd dollars.

The said lands are situated in the new county of Elmore, and in that part of it that at the date of said judgment formed a part of the county of Autauga. The said Porter, when the said judgment was recovered, and for some years had been, and then was, seized and possessed of the said lands, and so continued seized and possessed thereof, until the first day of February, 1866, when he sold and con-

veyed the said lands to plaintiff and another person, for the sum of nineteen thousand dollars, who went into the immediate possession of said lands, under their said purchase.

Of this nineteen thousand dollars, ten thousand were paid down, and the remainder secured by bills of exchange, which were paid at maturity, and before the filing of the bill, and before the defendant's execution was issued and delivered to the sheriff of the county in which the said lands lie.

The vendees, at the time of their said purchase, and at the time the purchase-money was paid, had no knowledge, in fact, of the existence of defendant's judgment; that plaintiff's co-vendee had sold to him his interest in said lands before the filing of his bill, and that nineteen thousand dollars was the full value of said lands at the time of said purchase.

At the time the bill was filed, the defendant, Martin, was proceeding to sell the said lands under an execution issued on his said judgment, and would have caused the same to be sold if he had not been prevented by the injunction granted on the filing of said bill.

Said Porter, at the time of said sale, was insolvent, and generally known to be in failing circumstances, but neither of the vendees had any knowledge or information of his pecuniary circumstances at the time of said sale to them. Porter, on the 4th day of May, 1869, applied for the benefit of the bankrupt law, and his assets were of little value, and his debts were over ninety-one thousand dollars.

The foregoing is the substance of so many of the facts agreed upon by the parties, as are necessary to be stated to understand the decision we now proceed to make on the merits of the case.

The first question that naturally presents itself on these facts, is, as to the character of the purchase made by the plaintiff and his co-vendee. Was it made in good faith, for valuable consideration, and without notice of the defendant's judgment, or of the existence of such circum-

stances as were sufficient to put them upon an inquiry, and such as the law holds to be equivalent to notice ?

It is admitted that, in fact, they had no notice of said judgment, nor had they any knowledge or information of the pecuniary circumstances of the vendor.

The fact that a party is insolvent, or in failing circumstances, does not prevent him from making a valid sale of his property. This will hardly be denied. Such circumstances may, perhaps, in some cases, be sufficient to put a prudent man upon inquiry. They, however, at most, only raise an inference, that what is generally known may be presumed to be known by any particular individual residing in the neighborhood ; but, an admission that such person has, in fact, no knowledge or information on the subject, overthrows such a presumption ; and it would be unreasonable to hold him bound to make inquiries about a matter of which he had no information. But, suppose the purchasers in this case had a knowledge of these circumstances, where naturally would they have gone to learn whether any judgments, executions, or mortgages existed, that might be supposed to be liens on the lands they desired to purchase ? Certainly they would have gone to the public offices and officers of the county in which the owner lived, and where the lands were situated.

Such an inquiry, in the present case, would no doubt have satisfied them that no such liens existed, as the defendant's judgment was rendered in a different county, and no execution had ever been in the hands of a sheriff of the county where the lands lie. Besides, in this case, the purchase was made at the full value of the property bought, and the larger part of the purchase-money was paid down, and the remainder in a short time afterwards ; and we hold it unreasonable to presume, that an ordinarily prudent man would purchase a plantation worth nineteen thousand dollars, at its full value, and pay the money for it, if he had any knowledge or information that the title was defective, or that it was subject to a lien of nearly half of its value. It, therefore, seems to us that the objection, that the plaintiff is not a *bona fide* purchaser for valuable consideration, and without notice, is not well taken ; but, we hold, that



the defendant's judgment was no lien upon these lands at the time of the plaintiff's purchase, as we will now proceed to show.

The courts of the rebel State government, during the continuance of the rebellion, probably, would have declared in favor of a lien, but it is unimportant for us to know whether they would, or would not, as it should have no influence upon the decision of this case. At the commencement of the late rebellion a judgment was no lien upon either real or personal property. To obtain a lien the plaintiff was required to sue out an execution on his judgment, and put it into the hands of the sheriff, and, thereupon, a lien was acquired, dating from the receipt of the execution by the sheriff. This lien was confined to the county in which the execution was so received by the sheriff, and continued so long, only, as an execution was regularly issued and delivered to the sheriff, without the lapse of an entire term.—Old Code, § 2456.

The rebel general assembly of this State passed an act entitled, "An act to regulate judicial proceedings," approved the 10th day of December, 1861, by which judgments were declared to be liens on all the property of defendants, whether rendered before or after the date of said act. Can this act of the rebel general assembly be held by the courts, of the present State government, to have created a lien on the lands of defendants in judgments, rendered by the rebel courts? If not, then defendant's judgment at the date of plaintiff's purchase was not a lien on the lands so purchased, and this, it seems to us, must be decisive of the present case; and then, the decree of the chancellor, perpetuating the injunction, is without error, and must be affirmed.

We deem it unnecessary to the decision of this case, to determine what should be held to be the real character of judgments rendered by the courts of the rebel government in this State—whether they should be treated as nullities, in cases where they have not been executed, or whether they should be considered as having the nature and effect of foreign judgments.

We know the rebel government in this State held the

government of the United States, and the governments of all the loyal States, to be, as to it, foreign governments, and the people of the United States to be alien enemies.—See the act of the rebel legislature, approved the 10th day of December, 1861, entitled “An act in relation to debts due alien enemies.”—Pamphlet Acts, 1861, p. 59.

By the first section it is enacted, “that until the legislature shall otherwise provide, no suit or other proceeding shall be prosecuted to judgment in any of the courts of this State, for any debt or money due to an alien enemy of the Confederate States of America, on or before the 21st day of May, 1861, or at any time since; or to any person who has been, is, or shall be engaged in actual hostility to said Confederate States; or who in any manner has given, is giving, or shall give, aid and comfort to the enemy engaged in war with said Confederate States.”

There is no mistaking or misapprehending the meaning of this language.

We thus see the rebel government in this State held and declared the government of the United States, and the governments of the loyal States, to be foreign governments, and the people thereof to be alien enemies; consequently, applying the rule thus laid down for its own government, no just complaint can be made by treating it, and all the other rebel governments in confederacy with it, as foreign governments, and the judgments of their courts as foreign judgments, though we do not hold them in any proper sense to be foreign governments, or their judgments foreign judgments; accurately speaking, they were not foreign governments, nor were the judgments of their courts foreign judgments.

In the case of *Chisholm, Comptroller, v. Coleman*, decided at the January term, 1869, we admitted they were governments that had the possession of the territory, and had in their power the lives, liberties, and property of the people, within their borders, but that they were rebel governments, and nothing more—governments in hostility to, and not parts of, the government of the United States.

Treating them, however, as foreign governments, and the

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judgments of their courts as foreign judgments—and, certainly, this is the best that can be said for them—what, then, is the character and legal effect of such judgments? and can they be enforced, by the courts of the present lawful government of this State—and, if so, by what law?

Chancellor Kent, speaking of foreign judgments, says, “no sovereign is obliged to execute within his dominion, a sentence rendered out of it; and if execution be sought by suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment; for the effect to be given to a foreign judgment, is altogether a matter of comity, in cases where it is not regulated by treaty.”

Thus, it is perceived, that a foreign judgment, accurately speaking, can only be enforced, in another jurisdiction or State, by the law of comity, in which the merits of such judgment may be inquired into—in other words, it constitutes a cause of action merely, that may be prosecuted in the courts of such other State, as a matter of grace, and not of right. It has, and can have, no lien upon the property of the defendant, in such judgment, out of the jurisdiction or State in which it was rendered.

But, suppose it be conceded, that the foregoing is a mistaken view of this question—which we by no means admit—and we go back to the consideration of the said act of the rebel legislature, entitled “An act to regulate judicial proceedings,” approved the 10th day of December, 1861, which, it is insisted, created a lien on the lands described in the bill of complaint, in favor of the defendant’s judgment; can that act be upheld as a valid law? If its purpose was, to give aid and encouragement to the rebellion then prevailing, it was void on the score of public policy. If its provisions impaired the obligation of contracts, it was in conflict with the constitution of the United States, and void for that reason.

We are unable to perceive how that act can be read, by any candid and unprejudiced mind, without seeing its illegal and unlawful objects and purposes, plainly written on the face of every section, and almost every paragraph of the same.



A rebellion had been inaugurated and boldly entered upon, without any just appreciation of the dangers and difficulties, to be encountered.

Those who had been mainly instrumental in promoting it, seem to have been ignorant, even to infatuation, of the strength of the government, and character of the people, they were setting at defiance, and endeavoring to destroy.

They had vainly persuaded themselves, that no real physical opposition would be interposed to prevent the accomplishment of their unlawful and criminal designs, and if there should be, it was confidently believed it would be feeble in its efforts, and of short duration.

Never had a people beguiled or deceived themselves into a greater error, or a more serious mistake.

Scarcely, however, had a year elapsed, before their eyes began to be opened to the magnitude of the dangers to which they were soon to be exposed, and the difficulties in providing the means of carrying on and prosecuting the stupendous war they had so unwisely provoked and brought upon themselves and their country; and which, in the end, was to overwhelm them by defeat and disaster.

The great, and, perhaps, the greatest necessity and pressing need that began to stare them in the face, was the want of money.

In the beginning, if war should be the result of their mad schemes, they had confidently relied upon the great staple and production of the country to supply their wants and give them, in abundance, the very sinews of war—money, without which, no war of any magnitude was ever successfully prosecuted.

Cotton, they thought, was king, and that the world could not live without it; and that they were the only people on the globe that could produce and supply this all important and indispensable article, without which, not only the United States, but all the commercial nations of Europe, would be brought to bankruptcy or starvation.

This was the source of all the vain hopes of interposition and recognition, on the part of England and France, with which the people were so often, and so successfully,

deluded during the progress and continuance of the rebellion.

But king cotton proved a great humbug. The blockade, as it were, successfully shut him up, and imprisoned him, in the midst of his own subjects, and thereby all their anxious hopes and expectations were disappointed and blasted. Then it was that other expedients became necessary to raise the money needed, and which it was found could not be realized from cotton and the other great products, rice and tobacco, almost exclusively grown on southern soil.

For the purpose of raising money, Confederate and State bonds, and treasury-notes, were issued. To give them currency and credit, and to enforce their circulation among the people, the said act of the 10th of December, 1861, and other like acts, were passed. For an instance, we may refer to the act entitled "An act to authorize executors, administrators, guardians and trustees, to make loans to the Confederate States, and to purchase and receive in payment of debts due them, bonds and treasury-notes of the Confederate States, or of the State of Alabama, and coupons which are due on bonds of the Confederate States, and of said State," approved the 9th of November, 1861.—Pamph. Acts 1861, p. 53.

This latter act has already been pronounced unconstitutional and void by this court, in the case of *Hoffman v. Boon & Booth*, at the June term, 1869, and by the case of *Houston, Guardian, v. Deloach*, decided at the same term.

By this act, hundreds, nay, thousands of helpless widows and orphans have been unlawfully, and, in a moral sense, criminally, reduced from plenty if not from affluence, to want and almost beggary.

Those who were chiefly instrumental in the passage of this and other like acts—many of them no doubt—now look upon their work, so productive of misery and suffering to the innocent and helpless, with deep regret, if not with remorse.

These acts, passed at a period of violent excitement, almost amounting to frenzy and madness, are the legitimate fruits of treason and rebellion. How truly hath the

prophet declared, that "rebellion is as the sin of witchcraft."

It is only necessary to look into the said act of the 10th of December, 1861, to see that both the charges made against it are true, to-wit, that it was in violation of public policy, and unconstitutional because it impaired the obligation of contracts.

The first section claimed to give a lien upon all the property of defendants to judgments rendered either before or after its passage.

The second section declared such liens destroyed, if the plaintiffs in such judgments refused to receive of defendants, when tendered, bonds or treasury-notes of the Confederate States, or of this State, *at their par value*, in payment of their judgments.

What was such a lien worth, if the defendant might destroy it at any time, by offering to pay the plaintiff his debt in worthless currency?

The fourth section enacted, that any execution upon any judgment or decree for the payment of money, in the hands of any officer for collection at the date of said act, if the plaintiff, in writing thereon, would direct the officer to receive in payment of the interest and cost due thereon, current bank-notes, or treasury-notes of the Confederate States or of this State, *at their par value*, the officer should proceed to collect the interest and cost, and then return the execution, stayed by operation of law. If the plaintiff refused to give such direction, the execution was to be returned, stayed by operation of law; and in that case, no other execution could be issued until the expiration of one year from the date of the ratification of a treaty of peace between the Confederate States and the United States.

The fifth section provided that no execution should be issued upon any such existing judgment or decree, nor upon any judgment or decree that might be thereafter rendered, *without the written consent of the defendant*, until after the expiration of one year from the date of the ratification of a treaty of peace between the Confederate States and the United States, except in attachment cases, and for the interest and costs due upon such judgment or decree, and



as thereafter provided, in certain specified cases, to-wit : if the plaintiff in any judgment or decree should make affidavit, that the defendant in such judgment or decree was about to remove his property out of the State ; or was about to dispose of his property fraudulently ; or was about to dispose of his property so as to defeat the lien of the judgment or decree, then the plaintiff, by giving bond, payable to the judgment debtor, with at least two good sureties, in double the amount of the debt, conditioned as in attachment cases, might have an execution as though said act had not been passed.

The seventh section enacted, that if it should be made to appear to the court, in any suit or proceeding commenced after the approval of said act, upon any contract for the payment of money, that before the commencement of such suit or proceeding, the defendant or his personal representative had tendered payment of the debt, or of the interest due on the contract, in bonds or treasury-notes of this State or of the Confederate States, or in current bank-notes, and the plaintiff had refused to receive them *at their par value*, the court was required to continue the case for three terms, exclusive of the term at which the suit was commenced ; and then, when judgment was rendered, the plaintiff was to be taxed with the costs.

The thirteenth section prevented sales under deeds of trust or mortgages, except on conditions not embraced in the deeds themselves, and utterly inconsistent with and repugnant to the plain stipulations of the parties, as rendered such securities, substantially, worthless. If such deeds gave the trustee or mortgagee an express power to sell, no sale could be made, without the consent of the maker or makers thereof, until after the expiration of one year from the date of the ratification of a treaty of peace between the Confederate States and the United States, except under a decree of a court of chancery, or under execution upon a judgment at law, upon the debt secured by the conveyance, unless the trustee or mortgagee had actual possession of the property conveyed ; and if it should be made to appear to the court, in any suit either at law or in equity, to enforce the payment of the debt secured

by any such conveyance, that, before the commencement of the suit, the makers or their personal representatives had offered to pay the debt, or the interest due thereon, either in coin, current bank-notes, or treasury-notes of the Confederate States or of this State, and the holder of the debt had refused to accept the offer, then the court should continue the cause from term to term, for three terms exclusive of the term at which the suit was commenced ; and when a judgment or decree should be rendered in the cause, the plaintiff should be taxed with the costs.

The nineteenth section, known as the suggestion section, permitted a defendant, where a levy had been made under any execution, to have the sale prevented and the execution returned, by delivering to the officer a written suggestion, that there was some irregularity or illegality in the execution, or in its issue, or in the proceedings under it, without even stating in what the irregularity or illegality consisted, or making any affidavit or oath that the said suggestion was true.

Without noticing the other sections of this strange and astounding act, it is enough to say, they are appropriate parts of a desperate system to enforce the circulation and give credit to the bonds and treasury-notes of the Confederate States, and of this State, and thereby to aid and sustain the rebellion. No language, it seems to us, is competent to set forth properly the strange and wonderful character of this law, and we will not do so absurd a thing as to make an argument, or cite authorities, to prove its invalidity and unconstitutionality.

It may be conceded that the first section of this act, by itself, would have been free from legal objection if passed by a lawful legislative body, but, it is manifest, that section, separated from the other provisions of the act, would never have been passed. It was no doubt made a part thereof as a sort of compensation for the injuries and wrongs done to creditors by other sections of this law, and, consequently, the entire act must fall together ; the whole of it being infected alike with the same unlawful purposes.

In the case of *Ashurst vs. Phillips, Ex'r*, at the June term, 1869, the 19th section of this act is declared uncon-

stitutional and void, as impairing the obligation of contracts, and Judge Peters, in his opinion denying a rehearing in the case of *Ray vs. Thompson*, decided at the January term, 1869, declares the whole act tainted with the same illegal and unconstitutional purpose; this, he says, would make it utterly void, were it not otherwise wholly without any legal force as a law.

If authorities outside of what appears on the face of said act itself, be necessary to sustain this opinion, they will be found in the cases of *Bronson v. Kinzie, et al.*, (1 How. 311,) and *McCracken v. Hayward*, (2 How. 608,) and other cases in the same court, before and after these two.

The main objection to this act being its unconstitutionality, it could not be helped or made valid by after legislation; therefore, the liens alleged to have been given to judgments by the first section thereof, were not, and could not be preserved and continued by the ordinance No. 5, of the convention of 1865, nor by the proviso to section nine, of the act of the 20th February, 1866, also entitled, "An act to regulate judicial proceedings," even if said ordinance and said act, or either of them, can be regarded by this court as having any validity, which we do not now either decide or admit, nor are said acts embraced within the purview and meaning of the act of the 29th July, 1869, entitled "An act to continue in force certain laws."—Pamphlet Acts, 1869, p. 7.

That act embraces only such laws contained in the Revised Code, as are not in conflict "with the constitution of the United States, or the constitution of this State."

We think that act was only intended to remove the doubts that existed as to the validity of the laws contained in the Revised Code, that had been passed by the legislative authority of the government inaugurated by Governor Parsons, under the power given to him by the President, without the consent or sanction of Congress. We, therefore, decide that the defendant's judgment is not, and never was a lien upon the lands described in the plaintiff's bill of complaint, that can be recognized or enforced in the courts of the present State government.



This opinion might well stop here without going further, but as the plaintiff contends that admitting the said act of the 10th of December, 1861, legally gave to judgments, then rendered and afterwards to be rendered, liens upon the lands of defendants, and that such liens were continued and preserved by subsequent legislation, that such liens were created by the mere act of the law, and not by the contract of the parties, and therefore might be, and were taken away and declared null and void by the act of the 10th of October, 1868, entitled "An act for the protection of *bona fide* purchasers for valuable consideration."

On the other hand, it is objected by the defendant, that said last named act is in conflict with both the constitution of this State and of the United States, and therefore null and void.

1st. It is alleged to be in conflict with the 2d section, article 4th, of the constitution of this State, which declares that "each law shall contain but one subject, which shall be clearly expressed in its title." 2d. That it impairs the obligation of contracts, and so is in violation of article 1, section 10, part 1, of the constitution of the United States.

As it is important to quiet titles, and to prevent useless litigation, that the validity of this act should not be left in doubt, and as the question fairly arises on the record, and has been argued by counsel, and pressed upon the consideration of the court, we will proceed to settle it at this time.

1st. The object of the act is to protect *bona fide* purchasers for valuable consideration; this is but one subject, and is clearly expressed in the title. The mode and the manner, and also the means, to be employed to accomplish this purpose, must necessarily be left to the wisdom and discretion of the legislature.

If the amendment or repeal of one, or many laws, were necessary to effect that purpose, there can be no objection that this is accomplished in a single act, with an appropriate title; that is precisely what is done by this law, and nothing more. After reciting the first section of the said act, of the 10th December, 1861, entitled "An act to regulate judicial proceedings," and certain parts of the several

acts having reference to the same subject, and sections 2876 and 2877 of the Revised Code, which are taken from said acts, it declares they shall be amended, as follows, to-wit: "That all the liens of judgments, created and preserved by the said acts, and sections of acts, or of the said Code, be, and the same are hereby declared to be, null and void, as against purchasers in good faith, for valuable consideration, in the following cases." It then proceeds to name the several classes of cases in which such purchasers shall be protected. The first class is thus stated: "When the purchase was made, before the delivery of an execution, upon the judgment, to the sheriff of the county where the property was situated."

This class clearly embraces the plaintiff's case. The defendant's judgment was rendered in the county court of Montgomery county, in the year 1862. The plaintiff's purchase was made on the 1st day of February, 1866, and the lands so purchased are in the present county of Elmore, and in that part of it, that at the date of defendant's judgment, formed a part of the county of Autauga. No execution on this judgment was delivered to the sheriff of the county, where the said lands are situated, until long after the sale made to the plaintiff, by the defendant in said judgment.

Now, for an example of a law, employing many ways and means to accomplish its objects, under a simple title appropriate to the subject, take the act entitled "An act to establish revenue laws for the State of Alabama." Under this title we have a law having reference not only to a general plan of taxation, embracing the levy and collection of taxes on property itself, but also the whole system of raising revenue from licenses on divers occupations, callings and professions, together with the election, powers, duties and compensation of the several officers and employees to be engaged in the business, as well as the penalties, and the mode and manner in which they are to be inflicted upon parties guilty of neglects or violations of duty; all which are appropriate to the attainment of the purposes of the one subject, the raising of the revenue for the uses of the State. This law, so far as we know, has never been

thought to be unconstitutional, as containing more than one subject not clearly expressed in its title. So the law, the validity of which we are considering, has a single subject, but its full accomplishment required the amendment or repeal of several laws and parts of laws, referred to and named in the body of the act, all being necessary to effect the purpose of the legislature, and all having reference to the same subject—the protection of *bona fide* purchasers for valuable consideration; and it seems to us, not only competent, but almost necessary to the completeness of the work, that they should all be embraced in the same act.

2d. It is argued that this act, by destroying the alleged lien of defendant's judgment, thereby impairs its obligation as a contract. In the first place, we have seen that said judgment is not and never was a lien upon the lands described in the plaintiff's bill of complaint. But if it ever was a lien on these lands, it was a lien created not by the act or contract of the parties, but by an act of legislation.

It is too well settled in this State, to be now called in question, that a lien given by legislation, may be taken away by legislation, without in any wise interfering with or impairing the obligation of contracts.—*Ray v. Thompson, supra*; *Watson v. Simpson*, 5 Ala. 233; and *Fitzpatrick et al. v. B. & W. Edgar*, same vol., 499–503; *Iverson v. Shorter*, 9 Ala. 713; *Beck v. Burnett*, 22 Ala. 822; *Bugbee v. Howard*, 32 Ala. 713, and *Curry v. Sanders*, 35 Ala. 280. We decide, therefore, that the objections to this act are without foundation—that it is not in conflict with either the constitution of this State, or of the United States.

The defendant makes another question on this record, which, if well made, will defeat the plaintiff's right to relief in this case, although all the other questions are decided in his favor. We will dispose of this question, and then close this opinion.

The defendant claims and insists, that "he has a right to sell such title as the law devotes to the satisfaction of his demand, so that the purchaser may have the benefit of testing at law the validity and superiority of title, which



the court of chancery can not, or ought not to undertake to try." In other words, we understand the defendant, by this, to insist that a court of chancery should not interfere to prevent a sale of the lands under his execution, but permit the sale to be made, that the purchaser might have an opportunity to try the validity of his title, so acquired, in an action at law.

We are not advised that a court of chancery has ever declined to exercise its jurisdiction, for protective and preventive justice, for such a purpose.

To do so in this case, would leave the plaintiff exposed to the inconvenience and the injury that would necessarily follow, by having a doubt or cloud brought upon his title, without having the power to have it removed, by a trial at law; for being in possession, he could bring no action at law to try the title himself—and the purchaser might either neglect or refuse to do so, waiting, it might be, for time to obscure the plaintiff's title, or till the evidence necessary to a successful defense might be lost, by the death of witnesses, or in some other way, or incapable of being fully and clearly made out, and in the mean while, the cloud upon the plaintiff's title, would render the land of comparatively little value in the market; for it is certain, no prudent man would be willing to purchase it at its fair value, while a third person was in possession of a sheriff's deed, and claiming title to the premises, under and by virtue of the same.

There are cases where a chancellor may refuse to interfere, and leave a party to his remedy at law, as, where a claim is set up, under a deed or title, void on its face.—2 Story's Eq. §§ 700, 702, and 701. But this is not such a case. Here the plaintiff has no remedy at law, to either prevent a sale, under the defendant's execution, or after a sale, to remove the cloud that would, thereby, be brought upon his title. The sheriff's deed would show no evidence of invalidity on its face. His only remedy, therefore, is in equity, where he can have the benefit of that preventive justice, that can only be had in a court of chancery.

A chancellor is as competent as a common law judge and jury to determine, for the purposes of this case, the

questions of lien, set up by the defendant, and, when settled, to quiet the plaintiff's title, by a perpetual injunction. That is what has been done by the chancellor in this case, and, we think, without error.—*Downing et al. v. Mann et al.* January term, 1869.

Let the decree of the chancellor be affirmed at the costs of the appellant.

### TURNER vs. TURNER.

[BILL IN EQUITY FOR DIVORCE ON THE GROUNDS OF CRUELTY AND ADULTERY,  
AND FOR GENERAL RELIEF.]

1. *Decree for divorce, assignments of error in relation to; when will be stricken out in this court.*—Assignments of error which question the validity of a decree for divorce from the bonds of matrimony, will not be heard upon appeal to this court, unless the appeal has been taken within three months from the date of the enrollment of such decree; but upon motion in this court such assignments will be stricken out.—Const. of Ala. 1867, Art. 5, § 30.
2. *Decree, enrollment of; date of, how fixed.*—The date of the enrollment of the decree for divorce in such a case, is the date of the decree as recorded in the minutes of the court by the register.—Revised Code, §§ 641, 725, cl. 4.
3. *Husband, domicil of; when not domicil of wife; what change of, will not deprive wife of.*—The wife remaining in this State, after the husband has removed to another State, is not to be deprived of the right to sue the husband, in the court of her domicil, for divorce and alimony, though he may be domiciled in the State of his new home.
4. *Condonation, always conditional.*—Condonation is always conditional. A renewal of the acts complained of by the wife, is such a revival of the acts condoned as will justify a divorce for the same.
5. *Cruelty; what acts of sufficient to authorize divorce.*—Striking the wife in the face, choking her, and pulling her hair, by the husband, are such acts of cruelty as will authorize a divorce in this State.
6. *Decree for divorce in favor of husband, by court of another State; when no bar to jurisdiction of court to decree relief in suit for divorce by the wife in this State, against the husband.*—A suit for divorce, commenced by the wife in the courts of this State, who is herself resident in this State at the time she sues, is not to be affected by another suit, subsequently commenced by the husband, for a divorce against her in the courts of

another State, to which he has removed, and to which the wife did not accompany him, and to which suit the wife was not a party, except by publication, although the husband's suit may be terminated by a decree in his favor against the wife, before her suit against him is terminated here. The jurisdiction of the court of this State, having attached in favor of the wife here, it will continue to be entertained, until its powers are fully enforced in her favor, regardless of the decree in favor of the husband rendered by the court of such other State.

7. *Alimony, amount of; what not excessive.*—A permanent allowance to the wife, on a decree for divorce, of the sum of \$30,000, is not too liberal when it appears that there are no children by the marriage, and but three children by a former marriage, who are each sufficiently well provided for, and that the estate of the husband is worth \$100,000.
8. *Alimony pendente lite; what not too large.*—An allowance to the wife pending a suit for divorce in her favor of \$800, is not excessive when it appears that the husband's estate is worth \$100,000.
9. *Solicitors of wife, fees of; when allowance of, may be made out of estate of husband.*—In a suit for divorce, in favor of the wife, on the grounds of cruelty and adultery, if it appears that she has no separate property of her own, the wife will be allowed reasonable counsel fees out of the husband's estate, for services actually performed.
10. *Voluntary gift or conveyance; when will be declared void.*—A voluntary conveyance or gift of property made by the father to a son, after the father has been sued for divorce and for permanent alimony, on the grounds of cruelty and adultery, will be declared void when it appears that such conveyance or gift was made to defeat the rights of the wife, and when the son had been properly made a party to the suit for divorce.

APPEAL from the Chancery Court of Talladega.

Heard before Hon. B. B. McCRAW.

The original bill was filed in this cause in the chancery court of Talladega, on the 2d of December, 1867, by the appellee, Ann G. Turner, against her husband, Matthew Turner, and his son, E. C. Turner. The bill prays for a divorce *a mensa et thoro* from the defendant, Matthew Turner, on the ground of adultery, cruelty, abandonment, &c., for alimony *pendente lite*, and for permanent alimony and for general relief. The complainant also charged that E. C. Turner, the son and agent of Matthew Turner, by his instructions and by virtue of a power of attorney from said Matthew Turner, is rapidly selling or removing from the State the property of Matthew Turner, in order to defeat the effect of any decree for alimony which might be rendered in her favor, and really to leave her without support,



and prayed that both defendants be enjoined from removing or selling any of the property of said Matthew Turner until the further order of the court, or until her proper allowance or alimony is secured to her, and also that a lien be declared upon the real and personal estate of defendant, Matthew Turner, for raising such sum of money, &c., and for general relief. Upon bond being given, injunction was issued as prayed for.

The marriage took place in 1853, at which time and up to the 27th of September, 1867, both complainant and defendants had resided in Talladega county, in this State, and complainant still resides therein.

Service was effected on E. C. Turner on the 23d December, 1867, and on the 2d of January, 1868, he filed his answer, denying all the material allegations of the bill as far as related to himself, and denying, as far as he had knowledge, the charge of adultery, cruelty, &c., against the defendant, Matthew Turner. He also demurred to the bill for want of equity and for multifariousness, and sets up condonation as to the adultery charged against defendant, Matthew Turner.

At the date of the filing of the bill, Matthew Turner was absent from the State, he having left on the 27th day of September, 1867. Previous to this, he had proposed to his wife (complainant,) to go to Kentucky to spend the summer, to which she agreed, if he would promise to be kind to her and not to abandon her; but to this proposition he was always silent. Some time before he left, he asked, and tried to induce complainant to sign away her dower in most of his real estate, which he proposed to give off to his children, by former marriages, in trust for his grand-children. Upon her refusal to do this, he made conveyances of the property as aforesaid; but, as he alleged, only after the refusal of complainant to accept any offer he had made for a settlement of property on her. After this he informed complainant that he had changed his mind, and was only going to look at the country. He afterwards left the State for Indiana. On the 17th of September, before leaving, and before his preparations for the trip were all complete, he went to complainant, bring-

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ing witnesses with him, and, without telling her where he was going, asked her if she was going with him. "Complainant, when this was proposed before, had several times told him that she would go with him if he would only promise faithfully not to treat her harshly, as he acknowledged had been the case in the past, and not to abandon her. Before this request, complainant had been made aware, by a letter which came into her hands, that Matthew Turner had advised with attorneys as to what was necessary to get a divorce, and as to which was the better State, Indiana or Kentucky; and, also, of the form of the question in which he was to ask complainant to go with him, in order, if she did not do so, to prove abandonment. When complainant heard this very form of words asked her, she was grieved and afraid, and she again told him if he would only promise not to be harsh to her, and not to abandon her, she would go. But to this inquiry he remained silent, and on again asking complainant if she would go, she answered: 'I'm afraid! I don't know what to do.' The defendant then turned to his witnesses and said: 'You hear her say she won't go!' and then bid her farewell.'" [The opinion sets out the main evidence in relation to the place, and *bona fides* of defendant's residence after leaving in September.]

The original bill, filed by complainant, set forth that the defendant, Matthew Turner, had left the State, and at that time was a resident of the State of Indiana, and prayed for an order of publication. Soon after this Matthew Turner returned to this State, and after several summons had been returned "not found," on oath of complainant that he was secreting himself and avoiding service of process, an attachment was ordered to issue. Service was accordingly effected on him, February 14th, 1868.

At the February term, 1868, leave was granted complainant to amend her bill by striking out the words *a mensa et thoro*, and inserting instead thereof *a vinculo matrimonii*; which was accordingly done. On 3d April, 1868, Matthew Turner filed his answer to the original and amended bills, denying all the material allegations, except the adultery charged with the negro woman Sally, as to which he sets

up condonation, &c. [The facts in relation to this part of the case are fully set out in the opinion.] He admits making the voluntary conveyances in 1867, as charged by complainant, to his children, in trust for his grandchildren; but avers that this was only done after repeated rejection by complainant of offers made by him of a suitable settlement on her, and after a refusal on her part to make any proposition as to what she would consider a suitable provision for her; that this was not done for the purpose of leaving her without a support, and that he is still willing to make suitable provision for her. He sets up condonation and the plea of the statute of limitations as to all the charges, and demurs to the bill for want of equity and multifariousness.

After this, several interlocutory orders and decrees for alimony *pendente lite* were made, and the cause continued until the February term, 1869. After this, leave was granted defendant, Matthew Turner, to file an amended answer to the original bill. The amended answer sets up, that "since the original bill in this cause, and the institution of this suit, to-wit, on or about the 30th day of January, 1869, the contract of marriage, and the bonds of matrimony then and before that time existing, were duly, legally and finally dissolved, by a legal, valid decree and judgment of the 'court of common pleas of Floyd county, in the State of Indiana;' that said court was a legally organized court of record of said county and State, and 'invested with general jurisdiction within the territorial limits of Indiana,' and with plenary powers, jurisdiction, &c., within the limits of said State of Indiana; and that said court had jurisdiction to render said decree, which is still of force and unreversed; that at the time of the institution of the suit and the rendition of the said judgment and decree, 'he was, and had been for more than twelve months before, a '*bona fide*' resident citizen of said county of Floyd, State of Indiana;' that the rendition of said decree is a full and complete answer and bar to the matters and things set up and complained of, and to the relief sought."

Attached to this answer, is a certified transcript of all



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the proceedings in said divorce suit in the court of common pleas of Floyd county, Indiana. From this it appears that Matthew Turner, by his attorneys, filed his petition for divorce on the 28th of September, 1868, alleging that he had married Ann G. Turner in 1853, and lived with her as his wife until September, 1867, "during all of which time he had been a faithful, kind and affectionate husband, and that in September, 1867, the defendant, without any just cause or provocation, abandoned the plaintiff, and has ever since refused and still refuses to live with him as her husband, nor is there any reasonable probability that they will become reconciled, or will ever live together again as husband and wife; wherefore, the plaintiff demands judgment that he may be divorced, &c., and for other relief." Affidavit was made by G. V. Hawk, Turner's attorney, that Ann G. Turner was a non-resident of the State of Indiana, without stating where she resided, or that her residence was unknown; and thereupon, publication was ordered for thirty days in the "*New Albany Weekly Ledger*," a paper of general circulation published in said county and State. On January 30th, 1869, the court rendered a decree, which, after stating the appearance of the plaintiff and the default of the defendant; that publication in the *New Albany Ledger* had been duly proved, adjudges that complaint be taken as confessed against the defendant; "thereupon came R. J. Shaw, who defends on behalf of the State, and by consent plaintiff's depositions on file are published, and this action is submitted to the court for trial, and the court, after hearing the proofs, finds that the material allegations of the complaint are true, and that plaintiff is entitled to relief as therein prayed for. It is, therefore, considered by the court, that the marriage contract heretofore entered into, and now subsisting between said Matthew Turner and Ann G. Turner, be and the same is henceforth finally, fully and completely dissolved, and the parties, and each of them, are freed from all the obligations thereof, at the costs of the plaintiff."

The laws of Indiana, in regard to divorces, are also made an exhibit to the answer. By the act approved May 13th, 1852, section 7 thereof, "abandonment for one year, or for

a less period, if the court shall be satisfied that reconciliation is improbable," is made a ground for granting a divorce. Clause 7 of section 7, which, after naming causes for divorce, gives an additional ground, to-wit: "Any other cause for which the court shall deem it proper that a divorce should be granted." By the act of March 4th, 1859, amendatory of the laws in relation to divorces, it is enacted, that "divorces may be decreed by the circuit courts of this State on petition filed by any person who, at the time of the filing of such petition, shall have been a *bona fide* resident of the State one year previous to the filing of the same, and a resident of the county at the time of filing such petition, which *bona fide* residence shall be duly proven by such petitioner to the satisfaction of the court trying the same." By the same act it is enacted, that divorces can not be granted for abandonment for less period than one year.

At the August term, 1869, the cause was submitted for final decree, on original and amended bills, answers and exhibits, and the testimony.

On the part of the complainant, twenty-four witnesses were examined, and fifteen witnesses on the part of respondents. The depositions of these witnesses are very voluminous, and it is impossible for the reporter to set out even an abstract of the testimony, without cumbering the report with a mass of evidence entirely unnecessary to an understanding of the points decided. The weight of the testimony abundantly sustains the charges of cruelty, adultery, &c. [The opinion sets out the evidence as to the condition in life of defendant, the amount of his estate, and the main features of the case.]

The final decree was rendered on the 14th of August, 1869, and ordered to be enrolled as of that date. It decrees, among other things, a divorce in favor of complainant from the bonds of matrimony with defendant, Matthew Turner; decrees an allowance of \$800 for alimony *pendente lite*, heretofore decreed by the court, and not paid, and the sum of \$30,000 as permanent alimony to complainant, "to be hers in absolute right, and when paid, to be in lieu of dower and distribution in his estate." It further decreed

that all the property conveyed by the defendant, Matthew C. Turner, to E. C. Turner, in this State, since the 1st day of January, 1869, by voluntary conveyance, is declared subject in his hands to the satisfaction of this decree. It was further decreed, that both defendants be enjoined from removing from the State, or otherwise disposing of the property of Matthew Turner, in this State, until the decree is complied with. It was further decreed, that complainant have leave to file a supplemental bill, against such persons as she may be advised, to reach and condemn to the satisfaction of the decree, any property of Matthew Turner, and any property that he owned on 1st January, 1869, and which he conveyed to voluntary donees.

On the 27th of November, 1869, the defendants appealed, and now make fourteen assignments of error, the following, among others :

1st. The court erred in the decree rendered.

2d. The court erred in rendering a decree for divorce from the bonds of matrimony in favor of complainant, against defendant, Matthew Turner.

3d. The court erred in decreeing that Matthew Turner pay complainant the sum of \$30,000 for permanent support and maintenance, "to be hers in absolute right."

4th. That the court erred in decreeing an injunction against defendants to prevent their removing or disposing of the property of Matthew Turner until the decree was complied with.

5th. That the court erred in decreeing all the property conveyed by Matthew Turner to E. C. Turner, in this State, since January, 1869, by voluntary conveyance, subject to the satisfaction of the decree, &c.

6th. That the court erred in allowing \$800 *pendente lite*.

The motion of appellee, in relation to striking out the assignments of error relating to the decree for divorce, is fully set out in the opinion.

BRADFORD, WHITE & RICE, for appellants.

MORGAN & LAPSLEY, for appellee.

PETERS, J.—The bill in this case was filed by the wife



against the husband, in the chancery court of Talladega county, in the eastern chancery division of this State. The suit was commenced on the 2d day of December, 1867. The causes alleged for the divorce are adultery, and cruelty by the husband to the wife. The original bill was for divorce from bed and board, but afterwards, it was amended by praying a divorce from the bonds of matrimony. There is also a prayer for alimony *pendente lite*, and for permanent alimony, and for general relief.

The husband, Matthew Turner, and his son, Edwin C. Turner, are made parties defendant to the proceeding. Both defendants answer, and deny the charges against them severally made in the bill, so far as each defendant has knowledge of the facts which constitute such charges.

The husband denies the allegations of cruelty, and all acts of adultery, except that charged with the colored woman Sally, in 1856, or 1857, and sets up condonation and the statute of limitations as to all the charges, and demurs to the bill for want of equity and multifariousness. His answer to the charge of adultery with Sally, so far as the adultery is concerned, is in these words: "Respondent states that complainant charged him with a want of conjugal fidelity at the time stated in this section of the bill, and that she did, after making the charge, voluntarily say to respondent that she would forgive him."

The charge to which this is intended as the answer is as follows: "Oratrix can not, as she is advised, properly and truly present to your honor the grounds of her complaint without reciting some of the painful facts in the history of her married life, which she would gladly withhold if she could do so in justice to herself. Within three or four years after her marriage, oratrix had been absent from home, on a Sunday evening, in company with another lady connected with the family, on a visit to a near neighbor. On her return, which was probably sooner than her husband expected, she found him engaged in adulterous association with a negro woman named Sally, his slave, and in a room in the house in which oratrix and her husband resided. Oratrix before that time had no suspicion that her husband was thus wronging her; and the discovery of the fact

was entirely accidental on her part. She was deeply grieved and deeply offended at this conduct, and so expressed herself, to her husband, and she made up her mind that she could not, with self-respect, remain his wife, and so informed him. Thereupon, the defendant, Matthew Turner, confessed the wrong he had done oratrix, and himself asserted that he had been overcome in a moment of weakness, and that it was his first departure from a virtuous life, and affirmed that it would be his last. He asked oratrix to forgive him. After consideration of the matter, oratrix thought it was her duty to forgive him, and did so. Oratrix had never since that time known him to be guilty of a similar departure from duty ; but on this day has been for the first time informed of such a fact. Oratrix forgave him in her heart, and did not afterwards, so far as she is aware, permit this matter to interfere with her conduct towards her husband. The woman, Sally, who was a house servant, was still retained in service about the house, notwithstanding oratrix requested her husband to have her removed ; and she supposes, that the servant, finding herself supported by the authority of her master, became insolent to oratrix, whereupon she chastised her. Oratrix's husband complained at her on this account, and forbade her to do so. Oratrix told her husband, that as long as he retained her about the house and under her management, she would punish her for any insolence that she might offer her, and the temper of her husband being roused, he threatened to whip oratrix, and made the woman, Sally, go out and get switches for that purpose. He forbore to strike her, however, and contented himself with threatening to whip oratrix."

The decision was for the complainant in the court below, granting a decree for divorce from the bonds of matrimony, and allowing the wife alimony *pendente lite*, and also permanent alimony. The defendants below appeal to this court, from this decree.

Before this cause is considered on its merits, it is necessary to dispose of the appellee's motion to strike out those assignments of error which relate to the decree for

divorce, because it appears that the appeal was taken after the lapse of three months from the date of the decree.

The transcript shows that the final decree of divorce was rendered on the fourteenth day of August, 1869, and ordered to be enrolled by the chancellor, as of that date.

The appeal was taken on the twenty-seventh day of November, 1869.

This shows that the appeal was not taken within three months after enrollment of the decree.

The section of the constitution of the State on this subject, which must govern the court, is in these words: "Divorce from the bonds of matrimony shall not be granted, but in the cases now provided for, and by suit in chancery; but decisions in chancery for divorce shall be final, unless appealed from in the manner prescribed by law within three months from the date of the enrollment thereof."—Const. Ala. 1867, art. 4, § 30.

The language of this section of the constitution is too clear for doubt. It is a peremptory order to this court, which it has no choice but to obey and enforce. This is a decree for a divorce from the bonds of matrimony, and upon this issue it is final in the cause after the three months mentioned in the constitution have expired. "The enrollment" of the "decision," here referred to, is the entry of the decree upon the minutes of the court, which is properly done as of the day the decree bears date, and which is required to be read in the court on the next morning and signed by the judge at the end of the term.—Rev. Code, §§ 641, 725, cl. 3, 3470; Rule Ch. Pr. No. 64. After the time mentioned in the constitution has expired, the decree for divorce becomes absolute. Its further litigation is ended, and its further consideration on appeal is denied to this court. It must, therefore, stand as it was enrolled. This is the only rational meaning the language of the constitution will admit, that gives any effect to the word "final," which it does not have without the aid of this section. It negatives the right of appeal, after the expiration of the term mentioned.—1 Kent, 316; *Ex parte Smith*, 34 Ala. 455; Adams' Eq. 375, 388. The constitutional provision repeals the section of the Code upon appeals, in such cases,



Rev. Code, § 3508. The motion to strike out the assignments of error referred to is therefore allowed, at appellant's costs. But even if this were otherwise, there is abundant evidence in the record, which is wholly free from suspicion, to sustain the chancellor's decree for a divorce from the bonds of matrimony. When it is considered that the defendant was old enough to have been his wife's father, that he had been thrice married and was a fraternising member of a Christian Church, his conduct was shamefully cruel, deceitful and inhuman towards his wife, from his first detection in adultery in 1856 or 1857, till he left her in September, 1867, under pretense of going to Kentucky; but in truth, for the purpose of going to Indiana and procuring a divorce. This is, in part, shown by his letter written from that State, on the 10th day of December, 1867, to her, in which, after rejecting her photograph which she had sent him, he says, "*you done me a bad wrong, a big sin*;" at the same time renewing an old slander, that he had hurled against her in 1862, when he told her that she and Matilda, a negro woman, "both were as thick with Jim Harris as the hairs on a dog's back." This charge was utterly groundless, as is shown in Mr. Harris' deposition. This was before the complainant's bill was filed. But after the bill was filed, and before the year's probation had terminated in Indiana, which was supposed to authorize the defendant, Matthew Turner, to procure a divorce there, he quite changed his mind. Some twenty or thirty days after the complainant's bill was filed, the defendant, Matthew Turner, wrote to his father-in-law, George Macon, his wife's father, in North Carolina, in which he says:

"*Dear Sir:* This will inform you that I am in great trouble—more than any one; and I call upon you to help me, and intercede for me. I pray you to do it, or it will not be done, for my good and for my wife's also. I want you to get her reconciled with me if it be possible. *I do love my wife and want to live with her as long as I live*; I ask you for the Lord's sake, and for the good of both me and my dear wife. I will not consent to a separation, and if I done wrong to her, I will humbly confess to her and my God, and will solemnly vow to her and God I will do

it no more. *Dear Ann has sued me for a divorce. She can dismiss it any day she thinks proper ; but for me to consent, I will not. I desire to pray you to intercede and get it settled, so as we may live happy*". This was written from "Joe Davis county" in Indiana, while the defendant was domiciled in that State, waiting for the term of twelve months to expire, after which he would be entitled to a divorce in his new location. And it was written concerning the complainant, whom the proof shows to have been beaten by this defendant in her face with his fist, until "one third part of her face" was "black and blue:" the same person at whom he had thrown a mug, at the breakfast table, with such force, that it had been shattered into atoms against the wall, by the force of the blow ; the same woman whom he had choked at night in their private bed-room, until she was so nearly suffocated, as to need the support of his arm, until she was so far recovered as to be able to sit up in bed, and which had made "the blood gush from her nose and mouth," (Mrs. Turner's deposition,) and the same dear wife whom he had compelled to stand in the floor, before him and his paramour, the colored woman, Sally, and cower under the switches which the latter had brought for the chastisement of her, then, mistress ! These are but a portion of the proofs upon which the chancellor's decree is founded. There can be no possible doubt of its accuracy.—*Moyler v. Moyler*, 11 Ala. 620 ; *David v. David*, 27 Ala. 222 ; *Smedley v. Smedley*, 30 Ala. 714 ; *Mosser v. Mosser*, 39 Ala. 313 ; *Hardin v. Hardin*, 17 Ala. 250 ; *Goodrich v. Goodrich*, June term, 1870.

The defendant, Matthew Turner, also relies on condonation by the wife. Condonation is always conditional. A renewal of the causes of complaint revives the right of the condoning party to insist upon the former offenses. It has been well said by a distinguished chancellor of this State, that "as to the question of what will amount to condonation of the wrongs and injuries sustained by the wife, when it has to be inferred from the acts of the wife, it would be exceedingly difficult to lay down any fixed general rule, which should govern all cases. The wife, who is timid and fearful, shrinks with horror and dismay from the

odium which attaches to a separation from her husband, and becomes the patient martyr of his tyranny and brutality, rather than seek peace in a separation, unless a time should arrive in the history of her sufferings, when, justified by the opinion of the world, and sustained by the counsel of friends, she might seek freedom in abandoning him. Such patient endurance would not amount to "condonation." The proof here shows that the defendant, Matthew Turner, repeated his acts of cruelty and infidelity upon more than one occasion, long after any acts of condonation by the wife.—Glover's dep., and McCall's dep.; *Hughes v. Hughes*, 19 Ala. 307; *Harrison v. Harrison*, 20 Ala. 629; *Reese v. Reese*, 20 Ala. 785; 2 Bish. on Mar. and Div. § 53 to 73, 4 ed. 1864; 2 Bish. on Mar. and Div. § 384, *et seq.*, § 471, *et seq.* The Indiana divorce in favor of the husband, Matthew Turner, against his wife, the complainant, may protect him upon a charge of bigamy, should he marry again in this State.—*Thompson v. The State*, 28 Ala. 1. But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot effect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him.—*Webster v. Reid*, 11 How. 460; *Nations v. Johnson*, 24 How. 206; *Boswell's Lessee v. Otis*, 9 How. 350; *Mills v. Duryee*, 7 Cr. 481; *Darcey v. Ketchum*, 11 How. 171, 172; *McElmoyle v. Cohen*, 13 Pet. 330; 2 Amer. Lead. Cases, 551; 3 Phill. Ev. on C. and H. notes, p. 353, note 636. It is the duty of the State to protect its own citizens, within its own borders. This is the natural compensation for allegiance. This high duty extends to all the pecuniary rights of the citizens, as well as to the rights of security of person.—Foster's Cr. Cas. p. 188; Story, J., in *U. S. v. Rice*, 4 Whea. 246, 254. No obligation of comity is paramount to this



duty. Without a constant and effective exertion of its citizenship would become a farce.—*Reid v. U. S.*, 3 Quart. Law Journ. p. 122; S. C. 4 Div. C. C. 21; *U. S. v. Moore*, 3 Cranch, 160, note. The wife is as much the citizen of the State as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction. It would be a scandal to justice to imperil her, and sacrifice her most important and cherished rights upon a mere technicality; a technicality that often contradicts the truth. When her protection requires it, it would be cruelly unjust for the State, of her actual residence and domicil, to repudiate its own right of jurisdiction to give her aid. I therefore think that the better opinion is, that she has the right to file her bill here, and to all the relief that the court could give her, notwithstanding her husband might not be domiciled in this State at the commencement and during the whole pendency of her litigation with him.—2 Bish. Mar. and Div. § 156, 4th ed.; *Cheever v. Wilson et al.*, Sup. Court U. S., Dec. term, 1869; *Ditson v. Ditson*, 4 Rhode, Island 284; 2 Bish. M. and Div. § 124, *et seq.*

Then, if the State courts have competent jurisdiction in such a case, as undoubtedly they have, they may go on and exercise that jurisdiction in the manner and to the extent prescribed by their own laws.

Under the laws of this State, by the contract and consummation of a marriage, the wife, if she has no separate estate, becomes entitled to dower in the husband's lands, and a certain distributive interest in his personal estate, if she survives him, and to temporary and permanent alimony out of his estate upon a separation by divorce in her favor. These are rights that she can not legally be deprived of, without her consent or her fault.—Rev. Code, §§ 1624, 1888, cl. 5, 1897, 2360, 2361, 2362, 2363. If this were not so, then these important statutory provisions in favor of the wife would be repealed or rendered null by a foreign divorce of which she had no notice and no knowledge, during its whole progress through the forms of a foreign court. To sue in her own domicil is necessary for the protection of the wife. It, therefore, overrides the technical rule,

that the husband's domicile is also the domicile of the wife. 2 Bish. M. and Div. § 768. Here, the testimony shows that the wife has no separate estate. The witnesses for the defendants say, when she was married, she "brought nothing with her." It also appears, that during her connection with the defendant Matthew Turner, as his wife, she was a chaste, industrious, economical, faithful, useful and obedient wife; and that the husband's property is very considerable; worth possibly not less than one hundred thousand dollars. It is also shown that his three children, by a former marriage, are already sufficiently provided for.

Under such a state of facts, the sum of thirty thousand dollars was not an unreasonable sum for permanent alimony, to be allowed to the wife, nor the sum of eight hundred dollars too large for temporary alimony.—*Ex parte Smith*, 34 Ala. 455; *Jeter v. Jeter*, 36 Ala. 391; Rev. Code, § 2362.

The other defendant, Edwin C. Turner, who is a son of complainant's husband, does not, in an equitable sense, stand in the court with clean hands. Whether he was cognizant of his father's scheme to dispose of his estate, in order to defeat the rights of complainant and procure a divorce in Indiana, and then turn her helpless upon the world, without the means of subsistence, is not so fully proven. But when any matter was to be transacted, which pushed things in that direction, he appears to have been always present, aiding and abetting. If he was not the public, recognized agent of his father, in the accomplishment of his purposes, the proofs leave it sufficiently certain that he was his confidential assistant. If he has come to evil by it, it is his own fault, and he must abide the consequences. *Quia in quo quis delinquit in eo de jure est puniendis*.—Coke, Litt. 233, b. A contract, deed or conveyance, or any other transaction made in furtherance of an illegal purpose, is itself illegal. Fraud vitiates every transaction that rests upon it. There can be no reasonable doubt, after reading Matthew Turner's letter to Mr. Macon, his father-in-law, bearing date the 26th day of December, 1867, after complainant's bill had been filed, that he still acknowledged that his "home" was still in Alabama,

and that it was his fixed intention to defeat his wife's suit for divorce, if he could. He then declares that he was "going to defend the suit to the last extremity and to the bottom dollar, sink who it may, elevate who it will."—(Mr. Macon's deposition.) The son seems ever to have been ready to help the accomplishment of this purpose. And we must regard the voluntary conveyance to him, made after the filing of the bill, as intended to be in furtherance of this end. After the complainant's suit was commenced, to aid her husband in the voluntary distribution of his property, so as to render one of the grand purposes of the suit abortive, was an unjustifiable attempt to defeat her rights. It is said that right in civil society is that which any man or woman is entitled to have, or to do, or to require from others, within the limits of prescribed law.—2 Kent, 1. To defeat this right, or to attempt to defeat it, whether by fraud or force, is forbidden by law.—1 Par. on Cont. 456, 5th ed. 1866; 2 *ib.* 769; 1 Fontb. Eq. 122, and notes, 6th ed; 1 Story Eq. § 258, *et seq.*; 2 Bouv. L. Dict., Trespass, p. 608, 12th ed. In a just controversy with the husband, the wife is entitled to have reasonable counsel fees allowed to her. *Jeter v. Jeter*, 36 Ala. 291. There are no grounds to sustain the defendant's demurrer to the bill.

No judgment is intended to be given, in this opinion, upon the validity or invalidity of the Indiana decree for divorce, further than it is connected with this case, and the complainant's rights in this suit.

There was, then, no error in the judgment and proceedings, in the court below, of which the appellants have any right to complain. Therefore, the decree and judgment of the chancellor is in all things affirmed, and the appellants, the said Matthew Turner, and the said Edwin C. Turner, will pay the costs of this appeal in this court and in the court below.



SCHUMAKER *vs.* SCHMIDT ET AL.

[BILL IN EQUITY TO ESTABLISH A WRITTEN COMPACT, AND TO HAVE A WILL SUBSEQUENTLY MADE, BY ONE OF THE PARTIES TO THE COMPACT, DECLARED VOID, &C. ]

1. *Will, what instrument is; how revocable.*—A writing purporting to be a will, executed by two persons, making a posthumous disposition of the property of the one who may first die, in favor of the other, and requiring the survivor to pay the expenses of the last sickness and burial of the decedent, and such debts as may be proved against his estate, is the separate will of the first decedent, and is revocable as other wills are.
2. *Joint will; how will operate.*—Two or more persons may execute a joint will, which will operate as if executed separately by each; and will be entitled to and require a separate probate upon the death of each, as his will. But if the will so provides, and the disposition made of the property requires it, the probate should be delayed until the death of both or all the testators.
3. *Mutual wills, how may sometimes be enforced.*—Mutual wills, duly executed, may, after the death of either party, in some cases be enforced in equity as a compact.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. A. C. FELDER.

George Schumaker, the appellant, and Edward Auerback, residing in Mobile, executed, on the 5th of November, 1864, the following writing: "Know all men by these presents, that we, George Schumaker and Edward Auerback, of the city of Mobile, State of Alabama, being of sound mind and memory, considering the uncertainty of life, do make and declare this, our last will and testament. First, we being friends of many years standing, and in consideration of that mutual friendship and esteem for each other, do mutually promise that, in the event of the death of either one of us, the survivor shall, after such death, pay all the expenses of sickness and burial, and whatever expenses of the estate may be due by proof. Second, the survivor shall enter into possession of the estate of the other, and shall hold it for his own sole use and benefit, and this is

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the mutual agreement of us. Whereof, in testimony, we have to this our last will and testament, contained on one sheet of paper, subscribed our names and set our seals. We have our names and affixed our seals, this 5th day of November, 1864.

(Signed)

"GEORGE SCHUMAKER, [seal.]

"E. AUERBACK, [seal.]"

This instrument was attested as follows :

"Signed, sealed and declared and published by the said George Schumaker and Edward Auerback to be their last will and testament, in presence of us, who, at their request, and in their presence, and in presence of each other, have subscribed our names as witnesses hereto.

(Signed)

"R. F. STARR, No. 58 Conti street.

"THO. LANGAN, No. 8 South Royal st."

It was placed in the hands of S. Festorazzi, of Mobile, for safe keeping by both parties.

On the 27th of August, 1866, Auerback made a last will and testament, in which he devised and bequeathed all of his real estate to Christian Schmidt, and all of his personal property to Auguste Egloffé, and appointed Schmidt his executor. He died soon afterwards, and this will was admitted to probate on the 7th of January, 1867.

The appellant's bill, filed on the day the will was proved, sought to establish the first instrument as a compact between him and Auerback, and to have the will declared void, or, if deemed by the court material, to have it proved in the chancery court, and decreed to be subordinate to the complainant's rights, with all the rights or powers passing under it, held in trust for him.

On the final hearing of the cause, on the pleading and proof, the bill was dismissed. For error, alleged in this decree, the appeal was taken.

ROBERT H. SMITH, for appellant.—The views of appellant, as presented by his bill, are fully exemplified by the note of Mr. Hargrave, appended to *Walpole v. Orford*, 3 Vesey, 402; 2 Hargrave's Juridical Arguments, 116; *Dufour v.*

*Pereira*, 1 Dickens' Ch. Rep. 419; and other authorities cited *post*.

Appellant contends that—

1st. The paper on which the bill is filed, is not and can not be a will;

2d. It is a compact which the chancery court will enforce; and

3d. This is so, even though it might be admitted to probate as a will at law, and in the probate court.

A will must be ambulatory, and its taking effect as a will must solely depend upon the death of the party whose will it is.

The paper can not be the will of both. If of either, it can only be the will of him *who died first*. Had complainant died first, it would (on the supposition of its being a will) have been his will. Auerback having died first, it is his will—not because of and upon his death, but because Schumaker has survived him. The case, therefore, is much stronger against its being a will and in favor of its being a contract, than that of two persons uniting in a joint or common disposition of their joint or several property to third persons.

It is not supposed that any case can be found where a paper has been upheld as a will, where its effect as such is dependent on the life or death of some other person than the testator. Particular devises and legacies may take effect or not on survivorship, but no paper can be a will, the validity of which depends on the death of some other person than the maker.

Upon the supposition that the paper is a will, it would, translated, read thus:

If Schumaker survives Auerback, this is Auerback's will; but if Auerback survives Schumaker, it is Schumaker's will.

The paper is not ambulatory. It is not revocable by either, because it contains covenants which are not dependent on any disposition of property, and which rests on valuable consideration. The clause for the payment of funeral expenses and debts, is a personal undertaking, and is to be performed without regard to whether deceased leaves suffi-



cient, or indeed any estate. The agreements throughout are, and are called, mutual agreements. It is the simple case of a contract resting on the consideration of mutual undertakings.

It is not revocable by one, because it is the paper of *two*, each providing for its operation, (as before shown,) on the contingency of survivorship. The whole matter spends its force by the combined facts of *death and survivorship*. The paper is made on consideration, contains mutual promises and mutual undertakings, and creates rights, all of which are incompatible with the ideas of revocation.

The acts of the parties show that they did not intend the paper should be revocable by either. It was made as a compact—it was placed in the hands of a third person. The parties thereby prevented themselves from revoking it by one of the means provided by the statutes of Alabama for revoking wills—by cancellation or destruction.—Rev. Code, § 1932.

That the paper can not be a will, is shown by the following authorities: Williams' Ex'rs, 104, and notes; *ib.* 10; 1 Lomax Ex'rs. 105, 106; *ib.* 3; *Hobson v. Blackburn*, 1 Ad-dams, 274, in 2 Eng. Ecl. R., top p. 115; *Clayton v. Livermore*, 2 Dev. & Bat. (Law,) 558; 2 Hargraves' Jurid. Arguments, 272; *Walker v. Walker*, 14 Critchfield's Ohio St. Rep. 157.

The discussion in 2 Dev. & Bat. is referred to as an able examination of the question, and as showing that the paper is not a will and *is a contract*; and although the devises are not of the same character as in the paper under consideration, the fact that *the survivorship* is the matter on which the paper could operate, regarded as a will, makes more strongly against its being a will.

That a man may, by contract, stipulate for a specific disposition of his property at his death, appears very clear and simple. What prevents my conveying all I have, reserving a life estate?—See *Izard v. Middleton*, 1 Des. 116; *Rivers v. Rivers*, 3 Des. 190; *Nelson v. Nelson*, 1 Wash. (Va.) 136, and authorities *supra*; *Wilkes v. Greer et al.*, 14 Ala. 437; *Scott v. Baker*, 13 Ala. 182.

I know of no law that forbids a man from making a contract which prevents his disposing of his property in a given manner, by will.

That the paper is, in equity, a *contract*, is shown by the admirable opinion of Judge Gaston, in 2 Dev. & Bat. 558; and by 14 Ohio, 157, and by 14 Ohio, (*supra*,) 173, 174.

In the language of Brickenhoff, J., in 14 Ohio, 173, 174, "such wills as this include something of the nature of a compact. Each provision must be made in view of, or in consideration of, and be influenced by, every other provision of the will."—*Dufour v. Pereira*, 1 Dickens' Ch. R. 410; 2 Hargraves' Jurid. Arguments, 116; see, also, Hargraves' note to *Walpole v. Orford*, 3 Vesey, 402. And this, though the paper might be admitted to probate in the law court as a will. Indeed, the dissenting opinion of Mr. Justice Daniel, in 2 Dev. & Bat., is predicated upon the idea, that the admission of the paper to probate as a will, in no wise interferes with the doctrine of *Dufour v. Pereira*, and he insists that the very paper there enforced as a compact, had been admitted to probate as a will, and the note of Mr. Hargrave, appended to *Walpole v. Orford*, (3 Vesey, 402,) applies to a subsequent will that the court had decided was to be probated. His position is, that though the codicil revived the old will as a will, and thus destroyed the mutual will, yet if the bill had been properly framed, equity would have held the executors under the probated will as trustees for the performance of *covenants* in the mutual will.

The mutual will in *Walpole v. Orford* would have been good as a will, if not revoked by a subsequent one—for it was, on its face, a will—but in fact and by reason of other proof, it could be made to appear that it was mutual and on a compact, and that astute juridical scholar, Mr. Hargrave, evidently thought that the doctrine of *Dufour v. Pereira* applied to the case, had the bill been framed to meet this view.

B. LABUZAN, and DARGAN & TAYLOR, *contra*.—Is the instrument set up in complainant's bill a will or a contract? We contend—

First—That it is nothing more than the will of each party in favor of the other. The phraseology of the instrument shows it to be a will. The language is, "That we, being of sound mind and memory, considering the uncertainty of life, do make and declare this our last will and testament." The attestation shows it. It recites that the instrument was signed, sealed and delivered as the last will and testament of the parties in the presence of the witnesses. It is attested in the mode prescribed by law, and takes effect upon such estate only as they may leave at their death. The evidence shows that it never was considered as anything else but their mutual wills in favor of each other. The situation and circumstances of the parties repels the idea that they intended to make a contract binding and irrevocable between them.—*Ex parte Day*, 1 Bradford's Surrogate (N. Y.) Rep. 476.

Lastly, it is shown to be a will; it is not to take effect until after death.—*Kinnebrew's Distributees v. Kinnebrew's Adm'rs*, 35 Ala. 640, and authorities there cited.

There is an expression in the instrument laid hold of by appellant's counsel, and which he contends evinces a contract. It is this, viz: "That the survivor shall pay the debts and funeral expenses of the party who dies first." This is nothing more than the law would require and compel each of them to do out of the property of the decedent.

Second—We contend that if the instrument is regarded as a contract, it is void—1st, because it is without consideration, either good or valuable in law; 2d, because it tends to fraud; 3d, because it is in the nature of a gambling transaction; 4th, because it is contrary to public policy. It is without any valuable consideration. Neither party paid any money to the other in consideration of which they were to make their wills in favor of each other. There was no debt due by one to the other, or services performed by one for the other, as a consideration for making their wills. It is true that each is required to pay the debts and funeral expenses of the one who dies first; but this is a duty which would be exacted by law of any one who administers on the property of the decedent.

There is not even what the law deems a good consider-



ation. The consideration expressed in the instrument, is the mutual friendship and esteem the parties have for each other. In *Kinnbrew's Distributees v. Kinnebrew's Admr's*, it is held that affection of a grandfather for his grand-child, is not a good consideration.—*Kinnebrew's Distributees v. Kinnebrew's Adm'rs*, 35 Ala. 637.

It tends to fraud. Wills are not required to be recorded until after probate. If it is held, as contended for by appellants, that the property of each is bound by the will from the time of its execution, and can not be alienated or encumbered, then it operates a fraud on creditors, because they could have no notice of the will. If, on the contrary, it be held that either may encumber, alienate or squander his property, then it is in fraud of the contract.—See note A to case of *Walpole v. Orford*, 419, side page. It is in the nature of a gambling transaction. It is a wager as to which will outlive the other. It is contrary to public policy. Suppose Auerback had married after executing this instrument, and had children. In this event, the marriage and birth of children would, by our statute, be a revocation, if the instrument be held a will; but if held a contract and irrevocable, the property would be bound and held by the contract, and the children in the case supposed, would be excluded from all participation in the property. If it is a contract for one purpose it is a contract for all purposes, and binding as well as if there was marriage and issue as if there were not. It can not be a contract in one aspect and for one purpose, and a will in another aspect and for another purpose. To hold that children could be thus debarred from participation in the property of the parent, and thrown penniless upon the world, would be repugnant to justice, humanity and right. Again, can an instrument be at the same time a will and a contract? A contract is defined to be the meeting of *two* minds upon a proposition. A will is the expressed desire of a single person as to the disposition of his property after death.

As to the equity of the bill. It is a bill for the specific performance of an alleged compact. The right to call upon a court of equity for the specific performance of a contract between parties is a mutual right, and is a matter not im-

perative upon the court to grant, but, in the sound discretion of the court to grant, or refuse, under all the circumstances of the case. The right being mutual between the parties, those standing in the place of the parties have the same right as the parties themselves.—2 Story's Eq. Jurisprudence, p. 110.

Now suppose Auerback, at his death, instead of leaving property unencumbered, had owed debts to that amount over and above the value of his property, could Auerback's creditors have filed a bill in chancery to compel Schumaker to take Auerback's property and pay his debts beyond the property left? We think not, because it would be inequitable. If, then, Auerback had left at his death, more debts than his property would pay, and Schumaker could not be compelled to take the property under this instrument, and pay all of Auerback's debts, it would be inequitable and unjust to allow him to take the property, because, at Auerback's death, it was clear of all incumbrance. To do this would be to destroy any mutuality of obligation.

It would result in this, viz: That it would leave to Schumaker the right to take the property if unencumbered, or to reject it if encumbered.

The authorities cited by appellant to show that this instrument is a compact to make mutual wills, do not sustain the proposition. There is but one case to be found in all the books where it has been expressly held, that where parties enter into a contract to make mutual wills, that a court of equity will enforce such an agreement. That is the case of *Dufour v. Pereira*, 1 Dickens' Ch. Rep., and is totally variant from the case now under consideration. We have not been able, after the most diligent search, to find this case. The notices we have of it, are contained in the following works: Williams on Exr's, chap. 3, Title, Revocation of Wills of Personality, vol. 1, p. 71—2d American from 2d London edition, and the case of *Lord Walpole v. Lord Orford*, 3 Vesey, 402.

The marked and prominent distinction between this case, and the one under consideration, is this: That in the case of *Dufour v. Pereira*, the mutual will was not revoked, or attempted to be revoked during the lives of the parties,

and not until long after the death of the husband, and after the wife had proven his part of the mutual will, and enjoyed the property of the husband under it, for seventeen years. Even then, there was no effort to enforce a performance of her part of the mutual will between herself and her husband, but simply to prevent her from interfering with his will as to other provisions contained in it.

In the case now before the court, the mutual will was revoked by Auerback, by his subsequent will during the life of himself and Schumaker. We assert, without fear of contradiction, that there is no case to be found in any of the books which decides, that where parties make mutual wills in favor of each other, and during the lives of the parties one of them revokes his will, that he has not the right to do so, with or without notice to the other. If there is no revocation of the mutual will by either of the parties, by making a subsequent will or in any other mode, perhaps it may be that this binds the survivor. But that is not the case here. It is argued and contended by appellant, that neither party can revoke during life, without notice to the other. What sort of a contract is that, I ask, which one party can annul at his pleasure, without the assent of the other, upon bare notice to him that he intends to do so. A contract is a mutual agreement and mutually binding, and neither party to it can, at his own mere will and pleasure, abrogate it. It would appear from the remarks of Mansfield, that in the case of *Dufour v. Pereira*, there was an express covenant between the parties not to revoke.—See *Walpole v. Orford*, side page 413. But if there was no such covenant, and the covenant had to be implied, the court would not do so, as it would be “big with fraud.” See, also, the remarks of the attorney-general, same case, side page 414, saying, “if he was not at liberty to revoke without notice, admits he had power to revoke; then how is it proved he could not without notice? *That is a most important term in the agreement.*” In the case now before the court, *there is no covenant not to revoke, and it can not be implied.* The attorney-general further says—same case and page—“if it had been by deed, no professional man would have permitted it to be done without a power of revocation



inserted: if by will, it would not be inserted, because the law gives a power of revocation." See, also, the remarks of the chancellor, same case, side page 419, to the same effect. We do not impugn the correctness of the decision in *Dufour v. Pereira*, but deny that (even upon the imperfect report of it in Williams on Executors, ante, and in the case of Walpole and Orford,) it has any application to this case. The decision has never been followed up in any adjudged case, and the courts, since that time, have manifested reluctance to bring any case within the rule established by it. The facts in that case might warrant such a decision; the facts in this do not.

In opposition to the authorities cited by appellant, and to show that the instrument is a *will and revocable*, and not a *contract and irrevocable*, we refer, in addition to our argument, to the following authorities: 35 Ala. Rep. 640; 19 *ib.* 59; 2 *ib.* 152; 1 Bradford's N. Y. Surrogate R. 476; *Walker v. Wakler*, 14 Ohio R. 157; 28 Georgia Rep. 98; 26 Conn. Rep. 452; and would add, that had not the instrument been revoked, it might have been probated in this county as a will, and that even if it is not probated as a will, it is nothing. Failing to be a will, does not necessarily make it a compact. It can not be a compact and irrevocable, because there was no valuable and necessarily mutual consideration; because, it was concerning no subject matter *in esse*. It was simply an attempt to convey such property as might be in existence at the death of the parties, and because it was a chance bargain against public policy, and which can not be enforced in equity.—35 Ala. Rep. 640; 1 Swift's Digest, 186, 189, 193; 1 Dessauseure Rep. 121; 37 Ala. Rep. 535.

B. F. SAFFOLD, J.—Was the writing between Schumaker and Auerback a compact, and not a will, or is it a will containing a compact irrevocable after its execution, or a will simply, and, therefore, revocable by a subsequent one?

The intention of the maker is the guide in construing all conveyances of property. This intention must be discovered mainly from the instrument itself, and parol testi-

mony can only be received to explain ambiguities. A writing may admit of construction, either as a deed or as a will. In such a case that interpretation should be given to it which will effect the will of the maker, and best preserve the rights of other contracting parties. So controlling is this rule, that in *Golding v. Golding*, 24 Ala. 122, an instrument conveying a posthumous interest was regarded a deed, because it could not operate as a will for want of the requisite number of witnesses; and in *Kinnebrew's Distr's v. Kinnebrew's Adm'rs*, 35 Ala. 628, a gift of money at the death of the donor was construed to be a will, because, being a voluntary executory trust, it would not, as a provision of an instrument operative *inter vivos*, be enforced by a court of equity.

In this case, the inducement to the writing is stated to be the long friendship, and mutual esteem of the parties. They say it is their mutual agreement, and declare that it is their last will and testament. The survivor, after the death of the other, is to pay all the expenses of his sickness and burial, and whatever debts may be established against his estate by proof. He is also to take possession of the estate, and hold it for his own sole use and benefit. They subscribe their names, and affix their seals to it as their last will and testament. The witnesses attest that they so declared and published it to them, and requested them to subscribe their names as witnesses to that effect, which they did in their presence, and in the presence of each other. The disposition of the property is posthumous entirely. No present interest is granted, and no consideration present, or within a reasonable or given time is required. The depositions of the witnesses, though somewhat variant in characterizing it, are not so precise and authoritative as the evidence derivable from the paper itself. No questions were asked them tending to a discrimination between a deed and a will.

Viewed as a contract, the most favorable interpretation of it would be, that each party, by a joint instrument, created in his own property a life estate to himself, with remainder to the other if he survived. The embarrassments attaching to property in this condition, and the evil

tendency of secret executory agreements, not to be revealed perhaps, until death had cut off the victim of fraud, make us averse to pronounce this a compact, in the absence of express declaration to that effect, or unavoidable deduction from its terms.

In *Habergham v. Vincent*, 2 Vesey, 230, Mr. Justice Buller said: "The cases have established that an instrument in any form, whether a deed poll, or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole the intention was it should have a future operation after death, it was considered as a will." Of all instruments a will is least governed by form. No matter how inartificial the expression, if the testamentary disposition of the maker is disclosed, it will control any contrary title or designation he may have given to it.—Jarman on Wills, (3d Am. ed. marg. p. 12.)

The result of what has been said is, that the instrument in question must be treated as a will, unless some consideration other than its testamentary character forbids us to do so. It is executed by two persons jointly, and disposes of the separate property of each in favor of the other. The law respecting joint, or mutual wills, is in much confusion. It is broadly asserted, by some authors, that they are unknown to the testamentary law of England. But this assertion is not supported by the cases whence it is derived. In *Hobson v. Blackburn*, 1 Adams' Eccl. R. 274, the joint will, the probate of which as the will of the sister, was rejected on the ground evidently of the irrevocability, had before been admitted to probate as the will of the brother. In *Dufour v. Pereira*, 1 Dick. 419, the wife was held to have bound her assets to make good all the bequests of the mutual will of herself and her husband, because she had proved it as the will of her husband, and had accepted and enjoyed, for a number of years, the bequests in her favor. There was no probate of it as her will; but, on the contrary, a subsequent will made by her



was proved. The case of *Walpole v. Orford*, 3 Vesey, 402, is scarcely an authority. The subject is discussed, but no decision is made. The American decisions by no means accord. In *Clayton v. Liverman*, 2 Dev. and Bat. (N. C.) R. 558, it was held that a testamentary paper, executed by two persons, could not be proved as a joint or mutual will, nor could it be proved as the separate will of either, because it purported to be joint, and also implied an agreement. But on this latter proposition Judge Daniel dissented, insisting that so far as related to the portion of property belonging to each, it was a separate testament, and revocable, there being no evidence of any agreement to the contrary. In *Walker v. Walker*, 14 Critch. Ohio State Rep. 157, it was held that, "where a husband and wife, each being the separate owner of property, join in the execution of an instrument in the form of a will, and treating the separate property of each as a joint fund, bequeathed legacies and devised lands to divers persons, the same can not be admitted to probate as the joint will of both parties, nor as the separate will of either." The reason upon which this decision mainly rests is that it contravenes the policy of the law in respect to the revocable nature of wills. Two out of five judges dissented. In *Ex parte Day*, 1 Bradford's Surrogate R. (N. Y.) 476, the proposition was broadly maintained that a joint or mutual will is valid, and may be admitted to probate on the decease of either of the parties as his will. This case was one in which a will executed by husband and wife was propounded for probate. It is represented meagerly in the last clause, as "a testamentary disposition by the decedent's wife of some property belonging to her in her own right," and was proved as the will of the husband. In *Lewis v. Scofield*, 26 Conn. R. 452, and *Evans v. Smith*, 28 Ga. R., mutual wills, as distinguished from joint wills, as where two persons join in the execution of one testamentary instrument, declaring that the survivor shall, after the death of the other, have his property, have been upheld, because, though joint in form, it is several in operation and effect, there being but one giver and one taker, and in

substance and effect, but the one testament of the first decedent.

The best summary of the law, on this interesting and somewhat intangible subject, as derived from the authorities entitled to the greatest consideration, is that two or more persons may execute a joint will, which will operate as if executed separately by each, and will be entitled to, and will require a separate probate upon the decease of each, as his will. But if the will so provides, and the disposition of the property requires it, the probate should be delayed until the death of both, or all, of the testators. The assertion in *Redfield on the Law of Wills*, p. 183, § 25, that it is settled in the court of chancery, by a great number of decisions, that mutual wills, duly executed, become irrevocable in equity, after the death of either party, is not sustained to that extent by the authorities there cited. It needs the limitation that, under the contingency stated, they may be in some cases enforced, in equity, as a compact.

The will under consideration, though made by two, is not a joint will, because by its terms it can be only the will of him who dies first. The survivor is to take all the property of the other, and no further disposition is made. Though classed under the general denomination of mutual wills, it is not in fact such, because the term implies the will of two persons. It is, therefore, the separate will of the first decedent.

Is there any thing of the essence of a compact in it which should interfere with its revocability? Can he who dies first, or the survivor, be injured if it be deemed revocable. The first decedent, while he lives, can receive nothing from the other, and his death concludes the operation of the instrument as to any reciprocal or hoped for advantage. On the other hand, if he revokes it, and makes other disposition of his property, the survivor is not injured. This would be the case if only a moment intervened between their deaths, or if they died at the same instant.

The suggestions in the English cases that notice of the purpose to revoke should be given to the other parties,

does not seem to present a sufficient point of support for the power of revocation, which ought rather to be regarded as the essence of a will.

The admission in evidence of the deposition of Egloffs has not been discussed by the appellant's counsel, and is not deemed material in the decision of this cause.

No other issue respecting the validity of the last will of the decedent, Auerback, is made than that herein considered.

The decree is affirmed.

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### SOUTHERN EXPRESS COMPANY vs. CROOK.

[ACTION AGAINST EXPRESS COMPANY, AS COMMON CARRIER, FOR DAMAGES FOR FAILURE TO DELIVER COTTON.]

1. *Common carriers ; when express companies are.*—Express companies who are engaged not only in the transportation of small parcels, packages, and articles of value, properly so-called, but also in the carriage of goods, wares and merchandise, and of the great staples and products of the country, are common carriers, and subject to the liabilities imposed by law upon such persons.
2. *Same, liabilities of ; how may be limited by special contract.*—Their liabilities may be reasonably limited by special contract, but public policy will not permit common carriers, even by special contract, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves, or their servants.
3. *Same, general notices in relation to ; when operative.*—General notices, in relation to the liabilities of common carriers, are of no avail unless reduced to the form of a special stipulation, and signed by the party sending the goods, or be so brought home to his knowledge as to show his assent thereto, and be also just and reasonable.
4. *Same, printed receipts limiting liability, if no value is named in ; when will be liable notwithstanding.*—The printed receipts, generally given and used by common carriers, containing conditions limiting their liabilities to a certain sum, unless the value of each package is named and stated therein, will not exempt them from liability for the value of packages lost by the negligence or fraud of themselves or their agents.
5. *Same, statement of value of package ; when will be presumed to be waived.*



## Southern Express Co. v. Crook.

If the size or appearance of a package fairly indicates that its value is greater than the sum so named, the carrier will be presumed to waive the necessity of stating a value, unless the attention of the shipper is called to the conditions, and the value of the package is required to be given.

6. "*Package*;" *what is not, in legal contemplation.*—Bales of cotton, in legal contemplation, are not packages, within the meaning of that word, as commonly understood when used in such receipts. Nor are they articles, the value of which is necessary to be stated to enable the carrier to understand the extent of his responsibility, or the care which should be observed in their transportation, or the sum to be charged for their carriage.
7. *Charge to jury; what should be refused.*—A charge that seems to put upon the jury the determination of a question which, on the evidence, more properly belongs to the court, should be denied.
8. *Actions ex contractu or ex delicto; what form sufficient in either case.*—Under our system of pleading and practice, a complaint in the form given in the Revised Code against a common carrier, is sufficient to authorize a recovery, whether the cause of action be *ex contractu* or *ex delicto*.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. B. L. WHELAN.

This was an action by the appellee, Crook, against the Southern Express Company, as a common carrier, to recover damages for the failure to deliver two bales of cotton which defendant undertook to carry from Blue Mountain to Selma, and there deliver to Williams & Boyd, as agents for the plaintiff. The complaint is in the form given in the Revised Code for complaint against a common carrier.

No pleas appear to have been filed. On the trial in the court below, the plaintiff introduced the following receipt, executed by the agent of said company at Blue Mountain :

"SOUTHERN EXPRESS COMPANY,

"Blue Mountain, Jan'y 23, 1866.

"Received of W. P. Crook two bales of cotton, (valued at ..... dollars, and for which amount the charges are made by said company,) marked (W. P. C., and shipped to Williams & Boyd, Selma,) which it is mutually agreed is to be forwarded to our agency, nearest or most convenient to the destination only, and there delivered to other parties to complete the transportation. It is further

agreed, and is part of the consideration of this contract, that the Southern Express Company is not to be held liable or responsible for the property herein mentioned, for any *loss* or *damage* arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever, except the same be proved to have occurred through the fraud or gross negligence of its agents or servants, unless specially insured by it and so specified in this receipt, which insurance constitutes the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated by the shippers at the time of the shipment and specified in the receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss, or detention of, or damage to each package herein receipted for. Nor shall said company be responsible for the safety of said property after its arrival at its place of destination. All articles of glass, or of liquids, will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury or loss by breakage, leakage, or otherwise.

“For the company,

C. GLOVER.”

“Freight.....C.

“Charges on value...\$”

All the parts of the receipt, except the articles, name of consignee, destination, and signature of agent, were printed.

The failure to deliver the cotton at Selma, its delivery to a stranger, and a demand before suit, and the value of the cotton, and its weight in January, 1866, were proved by the plaintiff. The defendant offered no evidence.

“On this state of proof, the court charged the jury, that if they believe from the evidence that two bales of cotton were delivered by the plaintiff to the defendant, to be delivered by the defendant to Boyd & Williams, as agents of the plaintiff in Selma, and if said cotton was lost by the gross negligence of the agents of the defendant, then the plaintiff is entitled to recover the value of said cotton, at the time it was so lost, with interest thereon.” To which charge defendant excepted.

At the request of the plaintiff, the court charged the jury as follows: "If the defendant was a common carrier, and received two bales of cotton from the plaintiff on January 29th, 1866, to be carried to Selma and there to be delivered to Williams & Boyd for a reward, and the defendant carried the cotton to Selma, and there, on the 30th of January, 1866, delivered it to Monks, Edwards & Co., and thereby said cotton was lost to the plaintiff, then the plaintiff is entitled to recover the value of the cotton on the 30th day of January, 1866, and interest thereon to the present time." To which charge defendant excepted.

The defendant then asked the following charges in writing to be given to the jury:

"1st. If the jury believe from the evidence that at the time of the shipment of the two bales of cotton, mentioned in the receipt, no value was put upon the cotton and expressed in said receipt, then the plaintiff can not recover more than \$50 for each package, if the same are lost.

"2d. The terms of the receipt in evidence do not fix on the defendant, in this case, the liabilities of common carriers, and if the cotton was delivered to defendant upon said contract, (as expressed in the receipt,) and was lost by being delivered to the wrong person, the plaintiff can not recover in this action.

"3d. If the defendant was not a common carrier in the receipt of this cotton, then the plaintiff is not entitled to recover in this action."

The court refused to give all or any of the charges, and the defendant duly excepted.

The charges excepted to, and the refusal to give the charges asked, are now assigned for error.

MORGAN & LAPSLEY, for appellant.—1. Carriers can certainly limit and qualify their liability.—*M. & O. R. R. Co. v. Hopkins*, 41 Ala. 486; *York v. Central R. R. Company*, 3 Wallace, 108.

2. They can limit and qualify their liability by stipulations requiring shippers to disclose value of package, and contract specially for the amount of responsibility.



This proposition is sanctioned by reason and common sense, for—

1st. Every contracting party has a right to know the extent and amount for which he is binding himself ;

2d. Unless he *knows* the amount of his liability, he can not be said to *consent* to it ;

3d. Unless express and other carriers *can demand* specification of value, they are liable to be imposed on, because they are bound to take what is offered.

It is sanctioned by many and high authorities for a hundred years back. Lord Mansfield, in *Gibbon v. Paynton*, (4 Burrow, 230,) says, "*that carriers are only bound for what they are fairly told of.*" This was decided in the absence of special contract such as we have in this case. See, also, the following : 2 Greenl. Ev. § 215 ; *Clarke v. Gray*, 6 East, 563 ; *Clay v. Willan*, 1 H. Blackstone, 298 ; *Orange Bk. v. Brown*, 9 Wend. 115 ; Selwyn, *Nisi Prius*, vol. 1, Am. Notes, page 420, note 1 ; *Nevins v. Bay St. Bk. Co.*, 4 Bosw. 232 ; Redf. on Carriers, p. 52, note 10, citing cases ; Angell on Carriers, p. 250 ; *Bowman v. Am. Ex. Co.*, 21 Wis. 152.

3. Wherever special contract exists, changing the character of a carrier from a common to a private carrier, the latter can not be declared against as a common carrier ; but the action must be on the special contract or for a breach of duty arising out of such contract. The above is a quotation from Story on Bailm., § 551, p. 548, (citing 26 Verm. 248 ; 13 Ad. & Ellis, (N. S.) 347 ; 5 Eng. Law & Eq. 329.) See, also, *York v. Central R. R.*, 3 Wallace, 107.

This was a special contract, and, therefore, the express company ceased to be common carriers and became as private bailees for hire—and should have been so declared against. The third charge asked by defendant and refused by the court, should have been given.

4. If it is sought to charge the express company for negligence, then, again, we say the form of action is wrong. They should have brought an action in form *ex-delicto*, or at any rate, the complaint should have alleged negligence or some misconduct on part of the company or its agents or servants.—See Redf. on Negligence, p. 12, note 3 ; *Nee-*

*dles v. Howard*, 1 E. D. Smith, 58; *Weed v. Saratoga R. R.*, 19 Wend. 534.

JOHN T. HEFLIN, and PETTUS & DAWSON, *contra*.

[Appellee's brief did not come into Reporter's hands.]

PECK, C. J.—Express companies were originally formed for the purpose of carrying and transporting, mainly, money, treasure, and other valuables, and the value, rather than the weight or size of the parcel or package, was looked to in determining the price to be charged for the transportation, and the risk thereby incurred.

There was, therefore, great propriety in having the value of the articles known, that the carrier might understand the extent of his responsibility, and also have some reasonable data to govern him, as to the compensation to be charged for the care and dangers he took upon himself.

Of late years, however, these companies have greatly increased in number, and in the nature, character and extent of the business in which they are engaged.

They are now competitors and rivals with the other great transportation enterprises of the day, and are engaged not only in the transportation of comparatively small parcels and packages, and articles of value, properly so-called, but also in the carriage of goods, wares and merchandise, and of the great staples and products of the country.

Consequently they have become, in every just sense of the term, common carriers, and must be held to the liabilities that the law imposes upon such persons.

These liabilities, it is well understood, may be *reasonably* limited by special contract, but public policy will not permit a common carrier, in this way, to be exempted from damages for losses occasioned by the negligence or misfeasance of himself, or of his servants.—*Mobile & Ohio R. R. Co. v. Hopkins*, 41 Ala. 486.

In a note on page 302, 1 vol. Redfield on Railways, it is said, "mere general notices in regard to the liabilities of

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Southern Express Co. v. Crook.

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carriers are of no avail, unless reduced to the form of special stipulations, and signed by the party sending the goods, and be also, in the opinion of the court before whom the case shall be tried, just and reasonable."

In the present case, the action is brought to recover damages for the loss of two bales of cotton.

The defendant's agent, at the time of the shipment, gave to the plaintiff, the appellee in this court, a receipt, consisting of a printed form, and filled up and signed by said agent.

The cotton was shipped at Blue Mountain, and was to be delivered in Selma to plaintiff's consignees, named therein.

The following portion of said receipt is found in the printed part thereof, to-wit: "It is further agreed, and is part of the consideration of this contract, that the Southern Express Company is not to be held liable or responsible for the property herein mentioned, for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire or any other cause whatever, except the same be proved to have occurred through the fraud or gross negligence of its agents, or servants, unless specially insured by it, and so specified in this receipt, which insurance constitutes the limit of the liability of the Southern Express Company, in any event; and if the value of the property above described is not stated by the shipper, at the time of shipment, and specified in this receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to each package herein receipted for, nor shall said company be responsible for the safety of said property after its arrival at its place of destination. All articles of glass, or of liquids, will be taken at the shipper's risk only, and the shipper agrees that the company shall not be held liable for any injury or loss, by breakage, leakage, or otherwise."

It does not appear that the attention of the shipper was drawn to the printed parts of said receipt, which have reference to many matters in no wise connected with the



shipment of the cotton, and if it had, he would not probably have supposed that by the word packages, bales of cotton were thereby intended to be embraced.

The evidence shows that the cotton arrived in Selma, the place of its destination, and on its arrival the defendant's agent, instead of delivering it to the consignees, named in the receipt, delivered it to a stranger, and thereby it was lost to the plaintiff.

The appellant, the defendant below, insists that as no value was put upon the cotton, and expressed in the receipt, the plaintiff could not recover more than fifty dollars a bale for its loss.

In the first place, we hold that bales of cotton are in no proper sense packages, and for this reason it was unnecessary to state their value in the receipt.

There is, in our opinion, no more reason in calling a bale of cotton a package than there is in holding a hogshead of tobacco to be so. Packages, as here used, must be interpreted to mean small parcels or bundles, whose appearance would give no adequate information of their value to the carrier.

In such cases there would seem to be great propriety in having their value named, to enable the carrier to make a charge answerable to the responsibility he would assume, and, at the same time, inform him of the care required to be taken of them.

Fair dealing and common honesty would seem to require this; but where the appearance of the article, itself, indicates its value, and advises the carrier of the care usually taken in the transportation of such articles, the necessity of having its value stated is not perceived. In such cases the carrier is liable, although nothing is said by the shipper about the value. — *Beck et al. v. Evans et al.*, 16 East, 244. It may, no doubt, be safely said that the value of cotton is as well, and, perhaps, as a general thing, better known to the carrier than to the shipper. Its value depends upon the public markets, the knowledge of which is alike open to both parties; there is, therefore, no real danger that any deceit or fraud will, or can be practised upon the carrier.

In such a case, then, if the carrier does not insist upon the statement of a value, we think the fair inference is that he does not consider it to be a package, or that the statement of a value is waived, and, in either case, the shipper should not be prejudiced by the omission.

What would be considered proper care in the transportation of the common products of the country, or of goods and merchandise, packed in the usual way, would be gross negligence in relation to small parcels or packages of value, that might be easily purloined or lost.

In this case the loss was occasioned by the delivery of the cotton to a stranger, at the place of destination, and not to the consignees of the plaintiff, whose names were written in the receipt; the defendant, therefore, was clearly liable for its loss. Under the circumstances, it seems to us, the delivery of the cotton to a wrong party may well be held to be an act of gross negligence.

The complaint is in the form given in the Revised Code against a common carrier. The trial seems to have taken place without any plea being, in fact, filed.

Under our system of pleading and practice, this form of a complaint is sufficient to authorize a plaintiff to recover against a common carrier, whether the cause of action be *ex-contractu* or *ex-delicto*.

The errors assigned are on the charges of the court; the court gave one charge of its own motion, and one at the instance of the plaintiff, to each of which the defendant excepted; and, thereupon, asked the court to give three charges, which were in writing. These charges were refused, and the defendant excepted.

It seems to us the defendant had no cause to complain of the charges given. The first, in substance, told the jury that if the cotton was lost by the gross negligence of defendant's agents, the plaintiff was entitled to recover its value at the time of its loss, and interest on the same. The plaintiff might well have objected to this charge, as it made his right to recover to depend upon gross negligence, which was clearly wrong.

The charge, given at plaintiff's instance, asked the court to instruct the jury, that if the cotton arrived in Selma, the

place of destination, and was there delivered to the firm of Monk, Edwards & Co., and not to his consignees, to whom it was shipped, and thereby it was lost, the plaintiff was entitled to recover the value of the cotton, and interest on the same to the day of the trial; there is no error in this charge. The defendant, by the express stipulations of the receipt, was bound on the arrival of the cotton to deliver it to the plaintiff's consignees. It was delivered to other parties, without showing any authority for such a delivery, and, thereby, the plaintiff lost the cotton; this, unquestionably, rendered the defendant liable for its value.

By the first charge asked, the defendant sought to avoid a liability, because the value of the bales were not mentioned in the receipt. This, as we have before stated, was unnecessary, for the reason that bales of cotton are not packages within the meaning of that word, as used in the receipt; and, for the further reason, that a bale of cotton is an article that sufficiently indicates its value, without any thing being said about it.—*Beck et al. v. Evans et al. supra.*

The second charge asked and refused is, in effect, that the terms of the receipt did not fix on the defendant the liabilities of common carriers, and if the cotton was received by defendant upon said contract, and was lost by being delivered to a wrong person, the plaintiff could not recover in this action.

We hold that the receipt alone, taken in all its parts, was sufficient to justify the jury in finding the defendant to be a common carrier. In addition to the corporate name of the defendant, the receipt, we think, can not be read without leading to the clear inference that the defendant was engaged in a general business of transportation for hire; this would make him a common carrier.—*Story on Bailments*, § 496.

A common carrier, whose common law liability is limited by an agreement, is, notwithstanding, liable for losses occasioned by his own misfeasance, or that of his agents, as if he, or they, deliver an article to a person not entitled to receive it.—*Story on Bailments*, § 570, and *Beck et al. v. Evans et al.*, 16 East, *supra.* And a recovery may be had



in such a case, under a complaint in the form given in the Revised Code.

The third charge asked was rightly denied. It seems to put upon the jury the determination of a question, that, on the evidence, more properly belonged to the court; it would have required the jury to determine the legal effect of the receipt. We think the fair construction of the receipt fixed the character of the defendant to be that of common carrier, and its construction, as to that question, was properly for the court, and not the jury.

There seems to be no error in the proceedings of the court below, and its judgment is affirmed, with five per cent. damages. The appellant will pay the costs of this court and the court below.

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## FORE vs. FORE.

### [INQUISITION OF LUNACY.]

1. *Lunacy, proceedings to determine ; what sufficient notice of, to lunatic.*—In proceedings of lunacy the service of the writ of arrest is the only notice to which the lunatic, idiot, or *non compos mentis* is entitled in order to bring him into court.
2. *Same ; proceedings in, sufficient if statute is followed.*—This proceeding is statutory in this State, and is sufficiently regular if the requirements of the statute are substantially complied with.
3. *Certiorari, effect of ; what judgment must be given on.*—*Certiorari*, unless the statute otherwise directs, brings up the record of the proceedings in the court below, and the appellate court must give judgment on this record. It must affirm or quash the judgment of the inferior tribunal. It can not reverse the judgment and remand the cause for a new trial.
4. *Quere.*—Does not an appeal lie from the final order of the judge of probate upon a proceeding of lunacy, as in other case of the final disposition of a case?

APPEAL from the Circuit Court of Monroe.  
Tried before Hon. P. O. HARPER.

From the bill of exceptions, taken at the hearing before the circuit judge in the court below, which bears date the 17th day of April, 1869, it appears that John F. Fore petitioned the honorable judge of the probate court of Monroe county, in this State, to have James Fore declared a person *non compos mentis*. This petition was filed on the 12th day of November, 1868, and it alleges, that petitioner is the nephew of said James Fore; that said James Fore is a male, about seventy-eight years old; that he resides about eight miles north of Midway, in said county of Monroe, and that he is *non compos mentis*, and unable to manage his own business. This petition is duly sworn to by the petitioner. On this petition, the judge appointed the 20th day of November, 1868, to hear said cause.

Writs were then issued for the summoning of a jury, and to take the said James Fore, the alleged *non compos mentis*, and if consistent with his health or safety, have him present at the place of trial, as required by law. This latter writ, for the arrest of the incompetent, was dated November 12th, 1868, and has the following return indorsed thereon by the sheriff, to-wit: "Executed on said James Fore; and I further return that it is not consistent with the health and safety of said Fore to be present at the trial; this, November 16th, 1868." At the time appointed for the trial, to-wit, on the 20th day of November, 1868, the cause was heard, and the jury found that the facts in the petition were true, "and that the said James Fore is a *non compos mentis* and incapable of governing himself or managing his own affairs." Upon this finding, the court ordered, adjudged and decreed, that said petition be recorded, and appointed said J. F. Fore guardian of the person and property of said James Fore, said *non compos mentis*.

On the 7th day of December, 1868, said James Fore, said *non compos mentis*, by his next friend, petitioned the judge of probate of said county of Monroe for his restoration to the custody and management of his estate. The facts of this petition were contested by said guardian, and a jury was summoned to try the facts. On the trial of this petition, the jury found against the petitioner, and that

the allegations set forth in his petition were "untrue." Upon this, the court decreed judgment for costs in favor of John F. Fore against the next friend of the petitioner, and ordered the proceedings to be recorded.

After this last judgment, said James Fore petitioned the honorable judge of the 11th judicial circuit of this State for a writ of *certiorari* "removing said petition so filed by said John F. Fore and cause into the circuit court of said Monroe county, Alabama, that said cause may be tried *de novo*." The prayer of this petitioner was granted, and a *certiorari* was issued accordingly, and said cause was thus taken into the said circuit court, but on motion of said John F. Fore, it was dismissed out of said circuit court. And this judgment of dismissal is now brought to this court by appeal.

S. J. CUMMING, for appellant.—1. The doctrine, that in a proceeding on inquisition of lunacy, the party sought to be declared a *non compos* must have notice of the proceeding, is too firmly established in principle, and by the decisions of this court, to be now controverted.—*McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504; *Chase v. Hathaway*, 14 Mass. 222; *Wait v. Maxwell*, 5 Pick. 219; 2 Barb. Ch. Pr. 230, 231.

Did James Fore have any notice in the case? There is nothing that can have the least claim to be a notice to the alleged *non compos*, but that set out on page nine of the record. What is that? It is simply a notice or order to the sheriff, directing him that "if it be consistent with the health and safety of said James Fore, you are hereby required to take his body, so that you may have him in said court, to be present at said trial." It is no notice to James Fore, and does not profess to be. It is simply an order to the sheriff as required by § 3190 of the Revised Code. It may be insisted that the return of the sheriff shows that James Fore had notice of the proceeding. What that return really is, must be determined by the order on which the return was made. That order informed the *sheriff*, and the *sheriff alone*, of certain facts, and directed him to do a certain thing, namely, "take his body so that you may have



him in said court to be present at said trial." And the execution of this order was simply by taking the body, and finding him unable to attend court, discharging him. That is the strongest view that can legitimately be taken of the return by the sheriff. But I insist, that the fair and proper construction of the sheriff's return, in the eye of the law, it involving a question of liberty and property, is, that the sheriff, finding that James Fore was physically unable to attend the court, gave him no notice of the proceedings, but returned the order to the probate court, with his endorsement thereon, as appears in the record.

2. So far back that it may be considered common law, the court of chancery, under the crown, alone had jurisdiction of lunatics and persons *non compos*; and in the court of chancery the alleged *non compos* was entitled to notice when a commission of lunacy was to be executed.

3. The case is strongly put by the supreme court of Massachusetts, in the case of *Chase v. Hathaway*, 14 Mass. Rep. 222. That court says, on page 226: "Indeed, it would seem strange that the whole estate of a citizen might be taken from him, and committed to others, and his personal liberty restrained, upon an *ex parte* proceeding, without any notice of the pendency of a complaint, upon a suggestion of lunacy or other defect of understanding, while the depriving him of the minutest portion of that property, or the slightest detention of his property, would be illegal upon a charge of crime, or of a breach of a civil contract, unless all the formalities of a trial were secured to him by the forms of process, and the regular execution of it." When a statute requires service of a notice upon an individual, it means *personal service*, unless some other service is specified or indicated.—*Rathbun v. Acker*, 18 Barb. 393; *Oakey v. Aspinwall*, 4 Comst. pp. 520–21; see, also, *Wait v. Maxwell*, 5 Pick. 217, as to notice.

4. The same line of argument on this point is taken up, and maintained by this court, in the cases of *McCurry v. Hooper*, and *Eslava v. Lepretre*, before cited; and the Massachusetts cases are referred to and cited with approbation.

5. Neither in the Massachusetts Acts, on the subject of

Inquisitions of Lunacy, nor in our statute as contained in the Revised Code, or under the law in Clay's Digest, is notice to the alleged *non compos* required. But all the cases before cited lay down the law as undeniable, that he must have personal notice, issued and executed on him according to the forms and requirements of the law.

5. The 12th section of the declaration of rights in the constitution of Alabama, declares "that no person shall be debarred from prosecuting or defending before any tribunal in the State, by himself or counsel, any civil action to which he is a party." But if a man can be tried, and his liberty restrained, and his property taken from him, without notice, he is deprived of this constitutional right.

6. That *certiorari* was the proper remedy and proceeding by which to take the case to the circuit court, is shown by the decisions of this court in *Ex parte Keenan*, 21 Ala. 558; *Lamar v. Commissioners' Court*, 21 Ala. 773; *The Commissioners, &c. v. Thompson*, 15 Ala. 134; *Barnett v. The State*, 15 Ala. 329; Rev. Code, § 747.

7. It may be that the filing the petition, alleging jurisdictional facts, may have given the probate court of Monroe jurisdiction of the subject matter. But here the court renders a personal judgment; and a personal judgment or decree is erroneous and void, unless the court has acquired jurisdiction over the person, as well as over the subject matter.—*Mitchell v. Gray*, 18 Indiana, 123; *Gray v. Hawes*, 8 California, 562; *Steen v. Steen*, 25 Mississippi, 513, and cases before cited.

J. W. POSEY, *contra*.

PETERS, J., (after stating facts as above.)—No doubt a *certiorari* may be improvidently granted. When this is the case, it should be dismissed.—*Winn v. Freele*, 19 Ala. 171; *Enis v. Ross*, 19 Ala. 239.

The jurisdiction of causes for the inquiry into lunacies and idiocies, and into such mental incapacity as renders a party incompetent to manage his own affairs, and requires the assistance of a guardian, has been transferred by our law from the chancellor to the judge of probate.

And this latter officer exercises the same jurisdiction that the chancellor did before this change, but in the manner prescribed by the statute; and the proceedings before the judge of probate must have the same effect, to the extent they go, that the like proceedings would have had before the chancellor. Judge Story lays down the chancery practice in such cases, which is no doubt correct, as follows: He says, "in regard to the manner of ascertaining whether a person is an idiot or a lunatic, or not, a few words will suffice. Upon a proper petition addressed to the chancellor, not as such, but as the person acting under the special warrant of the crown, a commission issues out of chancery, on which the inquiry is to be made, as to the asserted idiocy or lunacy of the party. The inquisition is always had, and the question tried by a jury, whose unimpeached verdict becomes conclusive upon the facts. The commission is not confined to idiots or lunatics, strictly so-called; but in modern times it is extended to all persons who, from age, infirmity, or other misfortune, are incapable of managing their own affairs, and therefore are properly deemed of unsound mind, or *non compotes mentis*. 2 Story on Eq. § 1365; Rev. Code, § 3189. In this case the requisitions imposed by the statute seem to have been very precisely pursued. The writ of arrest of the lunatic, or the alleged incompetent, was duly served upon him. This completed the jurisdiction of the judge of probate and brought the defendant into court; no other notice is required by the statute. If the defendant failed to avail himself of such matters of defence as he might have had to urge in his behalf, he must suffer the effect of his failure to do so. His ignorance of the time and mode of making his defense can not avail in the present condition of his cause. Ignorance of law, in such a case, does not excuse. *Ignorantia juris non excusat*.—Broom's Max. p. 122, marg. Aside from this objection, that the defendant, Fore, was not sufficiently and properly notified of the proceeding in lunacy before the judge of probate, which is so ably urged by the learned counsel for the appellant, the record of the proceedings before the judge of probate is devoid of irregularity. But this objection is not well



taken to this proceeding ; because it clearly appears that the defendant, Fore, had all the notice that the statute contemplates. This must be regarded as sufficient.—Rev. Code, § 3190.

A *certiorari* only brings up the record of the proceedings in the inferior court to the superior court, and the cause must be heard in the superior court on the record alone. There can not be a trial *de novo*, unless the statute has so directed. If there is no error in the record, the judgment of the inferior court must stand ; and such errors as do not grow out of the record, must be reserved by bill of exception, whether they arise out of law or fact.—2 Bac. Ab. Bouv. p. 162, *et seq.*; *John v. The State*, 1 Ala. 95. The judgment on *certiorari* is either that the proceedings below be quashed or that they be affirmed.—8 Yerg. 102, 118 ; 5 Mass. 423.

I think that an appeal may well lie in such a case as this. It is a proceeding before the judge of probate, and is disposed of by his order ; it is also a final disposition of the cause before him. The interest often involved is certainly such as would justify an appeal.—Rev. Code, § 2247, 3485 ; Const. Ala. 1867, art. vi, §§ 1, 2 ; 2 Chitty's Gen. Pr. 353, 354.

No doubt a party is entitled to notice of proceedings against him to have him declared a lunatic, or a person *non compos mentis*. But that is not the condition of this case. Here the party had the notice that the statute prescribes. This being so prescribed, it takes the place of all others, unless it is merely a cumulative statute. This is not so. The statute changes the old law, and it deals with the whole subject ; the form of the remedy, as well as the jurisdiction. In such a case the statute contains the whole law, and repeals the old requirements not copied into it. Then the writ of arrest is all the notice the defendant was entitled to, and this he received.—*Eslava et al. v. Lepretre*, 21 Ala. 504 ; Smith's Com. on Stat. p. 904, § 786.

There was no error, as shown by the record, in the proceedings in this suit in the court below. Its judgment is therefore affirmed. The appellant's representative will pay the costs of this appeal in this court and the court below.

MOORE *vs.* DICKERSON.

[JUDGMENT BY DEFAULT ON VOID ATTACHMENT.]

1. *Appearance, general; what is not, and can not have effect of.*—An appearance of a defendant by motion to dissolve an attachment is not a general appearance, and can not have the effect of one.
2. *Judgment by default, entry of; when will be treated as clerical error.*—A judgment entry that the parties came by their attorneys, will be treated as a clerical error on appeal, when the bill of exception shows that the defendants made default.
3. *Attachment; when premature and void.*—An attachment issued on the 9th day of November against one who had agreed to deliver cotton that fall is without authority of law and void, the obligor not being in default until the expiration of the fall, and the demand not being a debt.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. J. Q. SMITH.

The appellee commenced this suit by attachment, and the appellant, by motion entered on the motion docket, applied to the court for a rule upon the plaintiff to show cause why the attachment should not be dissolved, on the ground that it had issued before the maturity of his obligation, in a case not so provided for by law.

The plaintiff, resisting this motion, exhibited a contract dated March 3d, 1868, by which the defendant agreed to deliver to her "five bales of cotton of five hundred pounds each next fall." The attachment was issued November 9th, 1868.

The affidavit, bond, attachment, its levy, the complaint and the contract constituted all the evidence, and upon this the court overruled the motion. The plaintiff afterwards obtained a judgment, the entry of which recites that the parties came by attorney. The bill of exceptions, however, states that the defendant entered no other appearance than by his motion to dissolve the attachment.

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Moore v. Dickerson.

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The errors assigned are—

- 1st. Overruling the motion to dissolve the attachment.
- 2d. The judgment rendered.

FITZPATRICK & WILLIAMSON, for appellant.

GEO. S. COX, *contra*.

B. F. SAFFOLD, J.—An appearance by motion of a defendant to dissolve an attachment is not a general appearance, and can not have the effect of one.—Rev. Code, p. 815, Rule 1; *Lampley v. Beavers*, 25 Ala. 534; *Nabors v. Nabors*, 2 Port. 162.

The judgment in this case, as is shown by the transcript, ought to have been by default. The error in this respect, under the circumstances, must be regarded as clerical, and, therefore, not reversible, but the appellant must have the benefit of the proper judgment.

The cause of action is not a debt, to enforce the collection of which an attachment may issue before it is due.—Rev. Code, § 2927; *Bozeman v. Rose*, 40 Ala. 212. The obligation of the defendant was to deliver the cotton during the succeeding fall. The attachment was issued November 9th, 1868, before he was in default.—Add. on Contracts, 1133. It was therefore void.

A judgment by default, predicated on a void attachment, is void.—*Flash, Hartwell & Co. v. Paul Cook & Co.*, 29 Ala. 141; *Mathews, Finley & Co. v. Sands & Co.*, *ib.* 136; *Stevenson v. O'Hara*, 27 Ala. 362.

The judgment is reversed and the cause remanded.



OXFORD IRON COMPANY *vs.* QUINCHETT.

[ACTION FOR BREACH OF INDEPENDENT COVENANT.]

1. *Deposition ; when will be suppressed.*—A deposition, taken on interrogatories, without giving the adverse party the notice required by section 2718 of the Revised Code, will be suppressed, unless it be shown that the party to whom notice is required to be given, under the provision of said section, resides out of, or is absent from, the county. If the adverse party be a corporation, then it must be shown that the domicile or place of business of the body corporate is not in the county, and that it has no officer, or agent or attorney of record, within the county, to whom notice may be given.
2. *Same ; motion to suppress, when in time.*—A motion to suppress a deposition so taken, is in time if made after the parties have announced themselves ready for trial, but before the trial is in fact commenced.
3. *Deposition, taking of ; when irregular, what will not cure irregularity of.* It is irregular for the plaintiff to take a deposition in a cause before the defendant is in court, by the service of process on him personally, or by the attachment of his estate, or in some other legal way ; and such irregularity will not be cured by a subsequent voluntary appearance.
4. *Contract, made during rebellion ; what, is void and contrary to public policy.*—A contract made during the late rebellion, to loan or hire mules to a party, known at the time to be engaged in the manufacture of iron, for the late Confederate government, with a knowledge on the part of the bailor that said mules are borrowed or hired of him to be employed in the manufacture of iron for said Confederate government, to be used for military purposes in carrying on said rebellion against the United States, is in violation of public policy and void, and no action can be maintained thereon. \*
5. *Same ; what does not deprive owner of property of.*—Notwithstanding the illegality of such contract, the owner of the mules, in a proper action, may recover the mules, if in possession of the bailee, or their value if he has converted them to his own use.
6. *Quere.*—Whether, under the evidence in this case, the mules, by the contract of hire, having become lawful subjects of prize and capture, it would not be a good defense to an action for their recovery, that while employed in the unlawful business, they were captured and carried off by the forces of the United States ?

APPEAL from the Circuit Court of Calhoun.

Tried before Hon. W. L. WHITLOCK.

This was an action, by the appellee, Quinchett, against

the appellant, the Oxford Iron Company, to recover damages for the breach of an independent covenant or agreement, in not delivering to the appellee certain mules loaned or hired to the Oxford Iron Company in the year 1864.

The facts in relation to the motion to suppress the deposition of the appellee, Quinchett, and the evidence in relation to the loan or hiring of the mules, are sufficiently set out in the opinion.

JOHN T. HEFLIN, for appellant.

A. J. WALKER, *contra*.

PECK, C. J.—The deposition of the appellee, the plaintiff below, should have been suppressed.

The suit was commenced in August, 1866. The summons was issued against the appellant, as a body corporate.

The return of the sheriff is in the following words, to-wit: "Executed by serving a copy on E. G. Robinson, agent of the defendant."

There is no evidence in the record, in addition to the sheriff's return, that said Robinson was the defendant's agent.

The cause was put upon the docket at the fall term, 1866, and was continued, from term to term, until the March term of the court, 1869, when the defendant appeared by attorney, and pleaded—1st. *Nul tiel* corporation; 2d. The general issue, with leave to give any matter in evidence that might be specially pleaded.

On the 3d day of February, 1869, before any appearance had been entered, the plaintiff filed with the clerk an affidavit and interrogatories to take his own deposition, on the ground that he resided out of the State, without stating where his residence was.

No notice in writing, or otherwise, was given to the defendant, or to any officer or agent of the company, or to any attorney of the defendant, of the filing of said interrogatories; nor is there any evidence in the record, that the defendant's domicil or place of business was not in the county, or that there was no officer or agent of the com-

pany in the county, or that there was no attorney of record within the county.

On the 15th day of said month of February, a commission was issued, and on the 22d day of March following, the answers of the plaintiff to said interrogatories were taken in Memphis, Tennessee.

After the parties had announced themselves ready for trial, but before its commencement, the defendant moved the court to suppress the said deposition of the plaintiff, for the following, among other reasons, to-wit: That the court had not acquired jurisdiction of the defendant, when the said deposition was taken; that the defendant was not in court, by the service of process, appearance, plea or otherwise, when the deposition was taken; and that the deposition was irregularly taken, and without notice to the defendant, as required by law.

The court overruled the defendant's motion, and refused to suppress said deposition; and it was read in evidence, by the plaintiff on the trial, and the defendant excepted.

Where a party takes his own deposition, to be used on the trial of a cause, in his own behalf, he must be careful to comply strictly with the requirements of the law, that permits his deposition to be taken for that purpose, or it should be suppressed, on the objection of the adverse party.

Any other rule may, and we think will, lead to great injustice.

The policy of permitting a party to be a witness in his own case is, to say the least of it, a novelty; and it is to be feared will, in many cases, give to unscrupulous suitors, a great and an unjust advantage over conscientious parties.

Where the evidence is obtained by deposition, and there is no opportunity for a cross-examination, in the presence of the court, this may, perhaps, to some extent, be prevented, by requiring a strict observance of the law in such cases.

In the present case, the defendant has had no opportunity whatever to cross-examine the plaintiff, and for this reason alone, the deposition should have been suppressed.



If the service of the summons on the said Robinson, as the agent of the corporation defendant, was sufficient to bring the defendant into court, then it was sufficient to have required the plaintiff to give him notice of the filing of his interrogatories ; or to excuse his neglect, he should have shown, that he was not in the county, or had ceased to be agent, and that defendant's domicil, or place of business, was not in the county, and that there was no attorney of record, or officer, or agent, of the company, in the county, to whom notice could be given.

The fact that the defendant was sued as a corporation, does not change the principle, nor justify the course pursued by the plaintiff ; but is a reason why the rules of practice on the subject of taking depositions should be the more rigidly enforced.

If the person on whom the summons was served, was such an agent of the corporate body as authorized the service to be made on him, then, the notice of the filing of the interrogatories might have been given to him, or, to any other agent or officer of the company upon whom the summons might have been legally served.

But, it is well settled by the decisions of this court, that the service of the summons, as it appears by the return of the sheriff, without other proof, was altogether insufficient to bring the defendant into court, and any judgment that might have been rendered on that service alone, would have been erroneous.—*Planters and Merchants Bank of Huntsville v. Walker*, Minor's Rep. 391 ; *Lyon et al. v. Lorant & Krebbs*, Adm'rs, 3 Ala. 151 ; *Montgomery & Eufaula R. R. Co. v. Hartwell*, 43 Ala. 508 ; *Wetumpka & Coosa R. R. Co. v. Cole*, 6 Ala. 655 ; Rev. Code, §§ 2568, 3569.

We also hold it irregular for a plaintiff to take a deposition until the defendant is in court, by service of process on him personally, or by the attachment of his estate, or in some other legal way ; and such an irregularity will not be cured by the subsequent voluntary appearance of the defendant.

The motion to suppress this deposition was made in time. In the case of *Bryant v. Ingraham*, (16 Ala. 116,) it is decided that where a deposition is regularly taken, but under

circumstances which show that injustice may be done by using it, the court may, in its discretion, suppress it, but should not, unless a motion for that purpose is made, before it is offered in evidence; but if it be not regularly taken, it is illegal evidence, and must be rejected when offered, if objected to.

For the error in refusing to suppress this deposition, the judgment must be reversed, and the cause remanded for another trial.

There is an important question made on the record, that will, no doubt, arise on another trial—a question in which the validity of the contract, the foundation of the action, is involved, and for that reason, it is better to have it now decided.

The evidence set out in the bill of exceptions tends to show, and, if believed, we think does show, that the defendant, at the time the contract was made, was engaged in manufacturing iron for the Confederate States, to be used by said Confederate States for military purposes, in prosecuting the rebellion then being carried on against the government of the United States, and that defendant wanted the mules named in the contract set out in the complaint, to be employed in the business in which defendant was so engaged, and that the plaintiff, at the time of making said contract, and when the mules were delivered to the defendant under it, knew that defendant wanted said mules, and contracted for them to be used and employed in the manufacturing of iron for the purposes aforesaid, and that plaintiff also knew the purpose for which the iron, so to be manufactured by defendant, was to be used during the time defendant might have said mules in his possession under said contract.

We have no hesitation in pronouncing said contract unlawful and illegal, if made under the circumstances and for the purposes which the evidence, if true, tends to prove. If it did not constitute an act of treason, it was clearly traitorous in its character, in violation of public policy, and, therefore, void.

All the parties to it were alike guilty, and the courts will not permit either party to maintain an action on such a

contract. *Ex turpi causa non oritur actio*. No right of action can spring out of an illegal contract.—Broom's Legal Maxims, 704; *Blackford v. Preston*, 8 T. R. 93. The courts will not assist in giving effect to contracts which are expressly, or by implication, forbidden by law, or which are contrary to justice, morality, or sound policy.

“The defendant asked the court to charge the jury, that if they believed from the evidence that at the time the plaintiff agreed with the defendant for the use of the mules, and when the mules were delivered to the defendant, the plaintiff knew that the defendant was engaged in the manufacture of iron for the Confederate government, and wanted the mules to use in the manufacture of iron for the Confederate government, to be used by the Confederate government in carrying on the war then existing between the Confederate government and the United States, the plaintiff could not recover.” It seems to us this charge should have been given.

We do not intend, however, to be understood, that in a proper action the mules themselves, or their value, may not be recovered. The unlawful contract did not divest the plaintiff of his property, and if the mules remain in the defendant's possession, or if he has disposed of them, or converted them to his own use, he is, undoubtedly, bound to restore them to the plaintiff, or account for their value; but if, while in the defendant's possession, they were captured by the forces of the United States, and thus lost to both parties, we strongly incline to the opinion, that under the evidence in this case, if true, no action can be maintained against the defendant for the recovery of their value. If the plaintiff, by his agreement and voluntary act, placed the mules in the defendant's possession to be employed in an unlawful business—a business that rendered them the lawful subjects of capture and prize—then he must bear the loss that has followed and resulted from his unlawful conduct.

The judgment of the court below is reversed, and the cause is remanded for a new trial. The appellee will pay the costs of this court and of the court below.



## OSBORNE vs. MAYOR, ALDERMEN, &amp;c. OF MOBILE.

[APPEAL FROM FINE IMPOSED BY MAYOR'S COURT ON AGENT OF EXPRESS COMPANY, FOR TRANSACTING ITS BUSINESS IN MOBILE, WITHOUT HAVING TAKEN OUT LICENSE.]

1. *City of Mobile, § 2 of ordinance passed 2d day of March, 1866; not in conflict with the constitution of the United States, nor of the State of Alabama.*—That part of section 2 of an ordinance of the city of Mobile, passed 2d day of March, 1866, which requires the payment of an annual license of \$500 of "every express company or rail road company, who shall do business in the city of Mobile, and whose business extends beyond the limits of the State," is not in conflict with the constitution of the United States, nor with the constitution of the State of Alabama.
2. *Same, license required; not an import or export duty, nor regulation of commerce.*—Such a license tax is not an import or export duty, nor is it a regulation of commerce between the several States, nor between the State and foreign countries.
3. *State, power of to levy taxes; [to what extends, how limited.*—The power of the State to levy taxes, and impose licenses, extends to every species of property, and to all occupations within the State, except where the power is limited by the constitution of the United States, or by the constitution of the State.
4. *Power to tax may be delegated to municipal corporation.*—This power to levy taxes and impose licenses may be transferred to a municipal corporation within the limits of the corporation.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

The facts are stated in the opinion.

J. LITTLE SMITH, for appellant.—The judgment of the court below violates the following provisions of the constitution of the United States, and the acts of Congress made on the subjects to which these provisions of said constitution relate, that is to say: Article 1, paragraph 3 of section 8, which provides that Congress shall have power to regulate commerce with foreign nations, and among the several States, &c., and paragraph 18 of the same section.

Article 1, paragraph 5 of section 9, which provides that no tax or duty shall be laid on articles exported from any State; no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, &c.

Article 1, paragraph 2 of section 10, which provides that no State shall, without the consent of Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspecting laws, &c.

The ordinance in question imposes a greater tax on those express companies whose *business extends beyond the limits of the State*, than it does on the same companies whose business is confined to the limits of the State, and it prohibits any person or company from doing this, or any other business taxed by the ordinance, without payment of the tax or license required, and a penalty is imposed on such as do business without the payment of such tax or license.

A tax of ten dollars is imposed by the United States on all express companies or persons doing express business.—U. S. Statutes at Large, vol. 13, p. 473, § 50.

The tax being laid on the ground that *the business of the company extends beyond the limits of the State*, is a tax of discrimination on the business done not *within the State*, but that done *outside of or beyond the limits of the State*; that is to say, the subject matter of the tax is not within the State and subject to its sovereign power of taxation, but it is upon imports or exports merely, "*in transitu*," through the State. It, therefore, operates as a duty or import, on exports; it tends to prevent or impede licensed importation or exportation itself. It is a burthen on imports or exports as such, and interferes with the regulation of commerce by Congress, or its exclusive power to regulate it.

The ordinance taxes not its own citizens or their property, or an occupation pursued within the State, but something done in other States, or foreign countries. It is such external thing or business that is made the subject-matter of the tax, as contradistinguished from a subject matter or

business done within the State. It is the commerce or business done with other countries, which is the express reason or cause of a vastly heavier tax or license imposed.

The tax violates the rights of the several States, under the United States constitution, because one State can not tax the property or business of any one that is beyond the limits of the State imposing the tax, and therefore in another State, in a foreign country, or on the high seas. Certain personalty, which in point of fact is out of the State, is some times taxed by a State in which the owner resides, because, by construction of law, the "*situs*" of such property follows the person of its owner, but that is a very different thing from taxing the transportation of the property of others, whether in or out of the State, simply because the seat of such business, or a branch of it, happens to be in the State imposing the tax, and where the tax or unfavorable discrimination is upon, or because of such business, is beyond the State.

The ordinance prohibits any company from doing such business of carrying goods, by express, into or out of the State, to or from foreign countries, or a sister State, without having paid the discriminating tax required. The tax is certainly an import or duty, collected once every year on the imports or exports the express companies may carry, and if one sum can be imposed, any other, though it may be one that will amount to a prohibition of the business, may be.

What difference is there between a ship owner or captain carrying goods for hire, and an express owner or agent also carrying goods for hire? They are both means of commercial intercourse. Yet the supreme court of the United States has decided that ship owners or captains, and stage, steamboat, and rail road lines, can not constitutionally be taxed for transporting passengers or freight through a State, or to points beyond its limits, or for bringing them from without into the State.

This tax falls within the principles of these decisions, and not within that of Nathan's case, (8 Howard S. C. Rep. 79,) as shown. The principles referred to are found



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in the following cases :—*Brown v. Maryland*, 12 Wheaton, 436 ; *Southern Steamship Company v. Master and Wardens of New Orleans*, 6 Wallace, 31 ; *Amy v. State of Nevada*, 6 Wallace, 35 ; *State of Louisiana v. S. H. Kennedy & Co.*, in 1867 ; *Passenger Cases*, 7 How. Rep. 393 ; &c. ; *Gibbons v. Ogden*, 9 Wheat. 1 ; *New Orleans v. Southern Express Co.*, 7 Dist. Ct. MS. opinion.

The substance of the act can not be disguised by any new form in which the tax is imposed.—12 Wheat. 436.

C. W. RAPIER, *contra*.—The State may delegate to a municipal corporation the power to impose taxes.—9 Ala. 236 ; 6 Ala. 653, 899.

The State may tax all persons, property and vocations within its jurisdiction.—8 How. 82 ; 4 Cal. 57 ; 9 Ala. 236 ; 4 Peters, 514 ; 4 Wheat. 316 ; 12 Wheat. 419 ; 2 Pet. 449.

The State has concurrent power with the general government in regulations of commerce between the States ; or, at least, such a law of the State is valid if it does not conflict with an act of congress.—7 Howard, 578 ; 34 Ala. 249 ; 40 Ala. 133.

The validity of the State law can not be questioned, except by those who show a collision with an act of congress. 34 Ala. 249.

There is nothing in the ordinance in question, or the requirement of the tax it imposes, repugnant to any provision of the Federal constitution. No preference is given by the ordinance to the people of one State over those of another ; nor does the city charter, nor the ordinance, attempt to regulate commerce between the States ; nor does either have the effect of so regulating commerce.

PETERS, J.—The record shows that the corporate government of the city of Mobile, in this State, passed an ordinance on the 2d day of March, 1866, of which the following sections were a part, viz :

“Sec. 2. Every express company or railroad company who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of five hundred dollars, which shall be

deemed a first grade license ; if within the limits of the State, one hundred dollars, and shall be deemed a second grade license ; and if within the limits of the city of Mobile, fifty dollars, which shall be deemed a third grade license.” \* \* \* \* \*

“Sec. 35. Any person or persons, or incorporated companies, doing business or pursuing any avocation without obtaining the proper license, or who shall violate any of the provisions of this ordinance, shall be subjected to a fine not exceeding fifty dollars for each and every day’s violation thereof, to be imposed by the mayor and collected as other fines.”

It also appears that Frank R. Osborne, the agent of the Southern Express Company, doing business in the city of Mobile, was, on or about the 10th day of February, 1869, fined by the mayor of said city the sum of twenty-five dollars for a violation of this ordinance. This suit was taken by said Osborne, by appeal, to the circuit court for the county of Mobile, in this State, and submitted to the court on an agreed state of facts. The judgment against Osborne in the mayor’s court was affirmed, in the said circuit court, at its spring term, 1869. And from this judgment of the circuit court said Osborne appealed to this court. The only question insisted on in said circuit court, and again relied on in this court, is, that said ordinance, as to said express company, is unconstitutional and void, and that said express company is not bound to pay the tax for said license thus levied.

The grounds urged for this exemption, as I understand them, as set out in the brief of the learned counsel for the appellant, are, that said ordinance attempts to regulate commerce between this State and other States of the Union, and with foreign States, and imposes a duty on exports and imports, without the consent of congress.

The learned counsel for the appellant refers the court to article 1, section 8, part 3 ; article 1, section 9, parts 5 and 18 ; article 1, section 10, part 2, of the constitution of the United States, and the acts of congress to enforce these clauses of the constitution, as the grounds of objection to this ordinance. The acts of congress above mentioned

are but an effort to carry into legislative effect the constitutional provisions above referred to. They do not narrow the powers of the State.

Most clearly, the license tax levied by the corporation of the city of Mobile upon the express company, for the privilege to carry on its business in said city, is no export or import duty, either upon foreign trade or the trade between the States of the Union. These terms have been too clearly and repeatedly defined to allow any doubt of their significance now. This is a tax for "a license to do business," by the express company, *within* the limits of the city. It has nothing to do with the character of the goods and merchandise that the company may transport, or whether they may or may not transport any goods or merchandise at all. An import or export duty or tax is a tax levied directly upon the article imported or exported; that is, brought into the State or carried out of it.—*Brown v. The State of Maryland*, 12 Wheat. 419, 437, 438; *Passenger Cases*, 7 How. 283. This is not a license to export or to import. It does not, then, infringe either of the sections of the constitution referred to.

Neither is it a tax "to regulate commerce;" which is prohibited to the States. To regulate commerce, is to prescribe a rule by which it is to be governed.—*Gibbons v. Ogden*, 9 Wheat. 196; Story's Const. § 1061; Story's Const. § 1061, note 2. This is nothing of that kind. The company can conduct its business as it pleases, and charge what rate of fees for transportation it pleases. Express companies are common carriers, and this ordinance does not interfere with their duties, as such, in the slightest. It is simply a tax for license to conduct their business in the city of Mobile, and not a regulation of the business itself. It can not therefore be obnoxious to the constitutional provisions above cited.—*Baldwin v. The American Express Co.*, 22 Ill. 197; *S. C.*, 26 Ill. 504; *Southern Express Co. v. Caperton*, January term, 1870.

The State may delegate its power to tax or grant licenses to a municipal corporation within the limits of such corporation. This has been done in this case.—*Battle v. The Corporation of Mobile*, 9 Ala. 234; *Intendant of Marion v.*



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*Chandler*, 6 Ala. 899; *Eastabrooks v. The State*, 6 Ala. 653; *Lott v. Mobile Trade Co.*, June term, 1869, Head-notes, p. 20; *West v. Corporate Authorities of Greenville*, 39 Ala. 69; *Intendant of Greensboro v. Mullins*, 13 Ala. 341.

The power of the State to levy taxes and to impose licenses extends to every species of property, and to all occupations within the State, except where this power is expressly limited by the constitution of the United States, or by the constitution of the State itself. It has already been shown that the power here exercised does not infringe the constitution of the Union, and it is not forbidden by the constitution of the State. It is, therefore, legal.—*Crandall v. State of Nevada*, 6 Wallace, 35; *Weston v. City Council of Charleston*, 2 Peters, 449; Chief-Justice arguing, *Prov. Bank v. Billings et al.*, 4 Peters, 515, 516; *Nathan v. Louisiana*, 8 Howard, 79, 82; *Hinson v. Lott*, 8 Wallace, 148; *Woodruff v. Parham*, 8 Wallace, 123; *Waring v. The Mayor, &c.*, 8 Wallace, 110; *Paul v. Virginia*, 8 Wall. 168; Marshall, C. J., *arguendo* in *McCulloch v. The State of Maryland*, 4 Wheat. 316.

A State law, and, for a like reason, the law of a State municipal corporation, will not be declared unconstitutional unless it is clearly not in conformity with that instrument. *Fletcher v. Peck*, 6 Cr. 87.

The court below did not err. The judgment of the circuit court is, therefore, affirmed at appellant's costs.

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ERWIN ET AL., EX'RS, vs. MCGUIRE ET AL., ADM'RS.

[ACTION ON PROMISSORY NOTE—FILING OF CLAIM AGAINST INSOLVENT ESTATE.]

1. *Insolvent estate, claim against; what sufficient filing of.*—A copy of a claim against an insolvent estate, with a proper affidavit, delivered to the probate judge, is a sufficient filing of the claim, under § 2196 of the Revised Code.

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2. *Same; verification of; what must be.*—The verification must be legal evidence of a just and subsisting demand.
3. *Same; when claim need not be filed.*—It is not necessary to file in the probate court a claim on which suit was brought prior to the declaration of insolvency of the debtor's estate.

### APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

This action was commenced on the 16th of February, 1866, by McGuire and Satterwhite, as administrators, &c., against R. H. Erwin and F. G. Tait, as executors of the last will of F. K. Beck, deceased, on a promissory note, made by defendants' testator. The cause was continued generally until the spring term, 1869, when it was tried.

On the 18th day of March, 1867, the estate of Beck was declared insolvent. On the trial, in this cause, the defendant's filed five pleas, only the fourth of which need be noticed, and which is as follows: "Come the defendants and plead, in short by consent, that the estate of their said decedent, F. K. Beck, was decreed to be insolvent on the 18th day of March, 1867, and that the plaintiffs have not filed their said demand, properly verified, against the estate of said decedent, within nine months from the time when said estate was so declared insolvent, as by law required to do." Upon this plea the plaintiffs took issue.

The defendants proved that there was nothing in the records of the probate court, nor among the papers on file in said court, to show that the note had been filed in said court since the declaration of insolvency. The plaintiffs then introduced J. J. Roach, an attorney in whose hands the note had been placed for collection in 1864, who testified that in October, 1867, he made a copy of the note, verified by his own affidavit, which, according to his best recollection, was in the form prescribed by statute, and presented the same to the clerk of the probate judge, at the probate court, to be filed against the estate as an insolvent estate. Search was made for this claim, and the affidavit in the probate court, but it could not be found. Roach's knowledge of the correctness of the claim was not derived

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from his own knowledge, but from information from others. This was substantially all the evidence.

The court charged the jury, as follows : "1st. The plaintiffs can not recover in this action, unless the evidence shows that the note sued on had been filed in the probate court as a claim against the estate of Beck, as required by law, within nine months after said estate had been declared insolvent, and if the evidence showed them that a copy of the note had been filed in said court within that time, verified by the affidavit of a person other than the plaintiffs, and who stated in his affidavit that he had knowledge of the correctness of said note, such a verification was sufficient in this action, whether such person had personal knowledge of the correctness of the note or not, and that a deposit of such copy and verification with the probate judge's clerk, in his office, to be filed against said estate as an insolvent estate, within nine months after the declaration of insolvency, was a sufficient filing of the claim." To this charge defendants excepted.

The defendants then asked the court to charge the jury as follows :

"1st. That unless the original claim sued on was filed in the probate court, verified by the affidavit of the plaintiff, or of a person who knew of the correctness of the claim within nine months after the estate of said Beck was declared insolvent, then they must find for the defendants." This charge the court refused to give, and defendant excepted.

"2d. That unless they believe from the evidence that the note sued on, or a copy thereof, was filed in the probate court in nine months after the estate of said Beck was declared insolvent, verified by the affidavit of the plaintiffs, or of a person who knew of the correctness of the same, they must find for the defendants." This charge the court refused to give, and defendants excepted.

The charge given, and the refusal to give the charges asked, are now assigned as error.

COCHRAN & DAWSON, for appellants.—1. The statute, (Revised Code, § 2196,) requires all claims against insolv-



ent estates to be filed, verified, within nine months after the declaration of insolvency. The affidavit must be made by the claimant, or some person who knows the correctness of the claim, and that the same is due.—Rev. Code, § 2196.

2. The claim must be filed, although a suit is pending at time of the declaration of insolvency.—*Murdock v. Rousseau*, 32 Ala. 611; *Bell v. Andrews*, 34 Ala. 540 ; *Puryear v. Puryear*, 34 Ala. 556.

3. If a person other than the claimant makes the affidavit, such person must know the correctness of the claim, and that the same is due.—Rev. Code, § 2196. *The extent of knowledge* necessary to be possessed by the affiant is thus prescribed. He *must know* the facts, and the affidavit must show that he knows them.—*Lay v. Clark*, 31 Ala. § 409.

4. If a claim is filed with an improper or imperfect verification, it amounts to no filing at all, unless the verification is amended.—*Pickle v. Ezzell*, 27 Ala. 623. If the affidavit fails to show that the affiant knows the correctness of the claim it is insufficient. If it shows that he does, it will be *prima facie* sufficient. The verification is the proof adduced in support of the claim.—31 Ala. 409. And if it is shown that this evidence is not true, the claim should be rejected. Then, although the person making the affidavit swears that he knows the facts required to establish the claim, if it is shown that he does not know such facts, the verification or proof is defective, and the claim should be rejected. The objections required to be filed, under § 2203 of the Revised Code, could not be filed in this case because there was nothing in the probate court to show that any such claim had been filed there. If the question had not been raised on the trial in the circuit court, it could not have been raised afterwards by the appellants.—Revised Code, § 2209. The pleas presented the objections properly, and they were properly raised on the trial in the circuit court.—*Murdock v. Rohpea*, 32 Ala. 611.

S. J. CUMMING, *contra*.—1st. There is no error in the first

charge of the court. It conforms to the law as contained in § 2196 of the Revised Code. Stress appears to be laid on that portion of the charge contained in the following words: "Though the party making the affidavit did not know of his own knowledge of the correctness of the claim." The statute does not require that the affiant should swear, that he knows the correctness of the claim "*of his own knowledge*;" nor does it require it as a matter of fact. If the affiant knows the correctness of the claim from information received from the parties to the note, that certainly would be sufficient, though it would not be of his own knowledge. Suppose F. K. Beck, in his life-time, had told affiant that the claim was just and correct, affiant would certainly be in a position to make the affidavit; but he would not know its correctness of his own knowledge; he would simply know it from information.

2d. What is *his own knowledge*, when spoken of in regard to a witness giving testimony? It clearly does not include that which a witness gets by information from others. The word "*own*" distinguishes it from information, in legal acceptance.

3. In cases in which the affidavit is defective or insufficient, "the defect or insufficiency may be supplied by amendment or proof at any time before a *final decree*." The proof is clear, that the claim was filed within nine months, and sworn to. Now, even if the verification was "defective or insufficient," the plaintiffs were still entitled to a verdict ascertaining the amount of the debt, so that the judgment might be certified to the probate court. When the matter comes up for a hearing in the probate court, "or at any time before a final decree," the plaintiff can supply the defect or insufficiency, if there is any. It will also be noticed that the claim in this case was held by administrators, and they are only required to swear that they "*believe*" the claim to be just. The agent will not be required to make any stronger, or more positive verification, than would have been required of his principal, if he had made it.

4. The filing a copy of the claim is sufficient. The same words are used in Clay's Dig. p. 194, § 10, as those used in

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the Revised Code, § 2196. In Clay's Digest, it reads: "Every person having any claim against such insolvent estate, shall file the same in the clerk's office of the said court within, &c." In the Revised Code, it reads: "Every person having any claim against the estate declared insolvent, must file the same in the office of the judge of probate within," &c. This court has held that the filing a copy of the claim properly verified, &c., was sufficient in the following cases: *Rowdon v. Young*, Adm'r, 12 Ala. 234; *Rutherford's Adm'r v. Branch Bank*, 14 Ala. 92; *Ransom, Adm'r, v. Quarles*, 16 Ala. 437.

B. F. SAFFOLD, J.—The issues presented arose on the trial of a suit by the appellees against the appellants, after the commencement of which the estate represented by the defendants was declared insolvent. A copy of the claim, verified by the attorney of the plaintiffs, was delivered by him to the clerk of the probate judge within the required time. The attorney testified in this case that, though to the best of his recollection the affidavit was in the prescribed form, he derived his information of the correctness of the demand from others, and did not know it to be correct himself.

The errors alleged are: 1st. The instruction to the jury that the plaintiffs could not recover unless the note sued on, or a copy thereof, properly verified, was filed in the probate court within nine months after the declaration of the insolvency. But such a copy, with an affidavit made by another than the plaintiffs, whether he had personal knowledge of the correctness of the claim or not, left with the clerk of the probate judge, would be a sufficient filing. 2d. The refusal to charge, that unless the note, or a copy of it, accompanied by an affidavit of the plaintiffs, or some one who knew of the correctness of the claim, was filed in the probate court in proper time, the verdict must be for the defendants.

A copy of a claim against an insolvent estate, properly verified, delivered to the clerk of the probate judge, is a sufficient filing under section 2196 of the Revised Code.—*Flinn, Adm'r, v. Shackleford*, 42 Ala. 202.



If the allowance of the claim had been contested in the probate court, the evidence of its proper verification, as given in this case, would have caused its rejection. A just and subsisting demand must be shown by legal evidence. *Lay v. Clark's Adm'r*, 30 Ala. 409.

In *Murdock v. Rousseau's Adm'r*, 32 Ala. 611, it was held that a claim on which a suit is pending, when the debtor's estate is declared insolvent, must be filed like other claims, within nine months after the declaration of insolvency. The decision was based on the supposed imperative and comprehensive terms of section 2196 of the Revised Code. Walker, Justice, in a dissenting opinion, maintained the contrary as decided in *McDougald's Adm'r v. Dawson's Ex'r*, 30 Ala. 553, by arguments deemed by us as conclusive. He and Judge Stone, in both cases, held that the failure to file the claim was not a defense to the suit in the circuit court. But the latter maintained in the first cited case, that "if the creditor fail to file his claim in the probate court, the settlement may be had without any reference to it, and such creditor is left to other sources for its payment, should there be such sources." There can not be any other source, because all the property of the estate is vested by law in the administrator *de bonis non*, immediately upon his appointment.—Rev. Code, 2195. Besides, he can have no execution on his judgment, and it must be certified to the probate court.—Rev. Code, 2209.

The proceedings before the probate court in respect to the allowance of a claim against an insolvent estate is essentially a suit. Its rejection in a contest, in which the parties were represented, would be conclusive upon the plaintiff, notwithstanding the pendency of a suit upon the claim in the circuit court at the time of the decree of insolvency.—*McDougald's Adm'r v. Rutherford*, 30 Ala. 245. The cause commenced in the circuit court is permitted to proceed to judgment.—Rev. Code, 2208. The judgment of either court would be under competent jurisdiction; one could not nullify or give additional validity to the other. The pendency of the first suit could be pleaded in abatement of the second, and the first judgment rendered would

be a bar to the other action. The reason of the law requiring the filing and verification, which is notice to the administrator and proof of indebtedness, fails.

We decide that it is not necessary to file in the probate court a claim on which suit was commenced prior to the declaration of insolvency of the debtor's estate.

The judgment is affirmed.

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## MOBILE SCHOOL COMM'RS *vs.* PUTNAM ET AL.

[APPEAL FROM ORDER DISSOLVING INJUNCTION.]

1. "*Mobile School Commissioners*;" *charter of, public in its nature, and may be altered or amended by the general assembly.*—The board of commissioners, known by the name of "The Mobile School Commissioners," as created by the act of 10th January, 1826, was an irregular *quasi* corporation, public in its nature, and so continued, under all the legislation in relation thereto, down to the adoption of the present constitution of the State, and, therefore, subject at all times to legislative control.
2. *Same; charter of, not a contract protected from impairment by constitution of United States.*—Said corporation was created for public ends and purposes, and not for private benefit or emolument; the corporators had no property in the corporation, nor have they paid to the State any thing amounting to a valuable consideration, for its charter; consequently, no contract existed between it and the State, the obligation of which is protected from impairment by the constitution of the United States.
3. *Board of education; power of, over public educational institutions.*—The board of education has full legislative powers in reference to the Mobile School Commissioners, and other public educational institutions; and all the public educational institutions of the State are legally under the control and management of the superintendent of public instruction and the board of education.
4. "*Mobile School Commissioners*;" *power of State over funds of.*—Although the State may not have the constitutional power to divert from the purposes of the trust, the funds which have been, and are, from time to time, increased and augmented from the bounties and revenues of the State, it may, nevertheless, in its discretion, change the administrators of these trust funds, and the manner and mode of its administration.

5. *Injunction ; dissolution of, before answer of all defendants has come in, when proper.*—Generally, an injunction properly granted should not be dissolved until the answer of all the defendants has come in ; this rule is, however, subject to modification and discretion. Where there are more defendants than one, if the defendant, on whom the *gravamen* rests, to whom the facts charged are better known than to the other defendants, and within whose knowledge the facts must be, if they exist at all, has fully answered the bill, section 3438 of the Revised Code will authorize the dissolution of the injunction in vacation, without awaiting the answer of his co-defendants.
6. *School-moneys for Mobile county ; who only is authorized to draw from State treasury.*—Under the present laws of the State, the superintendent of education for Mobile county is the only person authorized to draw from the State treasury, moneys belonging to said county for the use of public schools therein.
7. *"Mobile School Commissioners ;" office of, when vacated.*—By the act of August 11th, 1868, the offices of the Mobile school commissioners became vacant. The words "other school officers" embraces school commissioners. If the complainants, claiming to be such commissioners, were elected or appointed after that date, they ceased to be such school commissioners, by virtue of the resolutions of the board of education of the 19th day of August, 1869.
8. *Board of education ; "full legislative powers" of, what embraces.*—The "full legislative powers" vested by the constitution in the "board of education," clothed it with all the powers which the general assembly might have exercised, if legislative power had not been conferred on the "board of education," in reference to the public educational institutions of the State. This power covers the whole field of legislation on this subject, including officers and agents to be employed, the mode and manner of their election or appointment, and their tenure of office ; for what causes, and how and by whom removable ; their duties and compensation, &c.
9. *Same ; session of, how long may continue.*—Under article 6, section 7, of the constitution, the board of education may continue in session twenty business days, not including Sundays ; and it does not require that they shall follow in successive order. There is no reason why the board of education may not take a recess, without having the recess counted against it.
10. *Same ; acts of, what will be presumed to sustain.*—If necessary to sustain the acts of the board of education, it will be presumed that the session was continued for a longer period than twenty days, "by authority of the governor."
11. *Same ; general acts of, public acts.*—The general acts of the board of education are public acts of which the courts will take judicial notice, as of the other public acts of the State, and the same presumptions will be made in their favor.
12. *Same ; what act of, is not a law, in any accurate sense, and does not require approval of governor.*—A resolution of the board of education, approving or disapproving the appointment or removal of an officer, is not in any accurate sense a law, but is merely an administrative act,



and does not, therefore, require the approval of the governor to give it effect.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. A. C. FELDER.

This was a bill in equity exhibited in the chancery court of Mobile, by W. G. Clark and other persons claiming to be "the Mobile school commissioners," a corporation created and recognized by the laws of Alabama, against G. L. Putnam, N. B. Cloud, superintendent of public instruction, R. M. Reynolds, State auditor, and Arthur Bingham, State treasurer, praying for an injunction to prevent the payment to the defendant Putnam of certain moneys in the State treasury, which they allege are properly payable to them as such school commissioners, for the use of the public schools in Mobile county, and for general relief. Upon bond being given, an injunction was granted according to the prayer of the bill.

The original bill was amended by leave, before the hearing of the motion to dissolve the injunction, by averring that in addition to the sums of money raised by taxation from Mobile county alone, about \$50,000 of which had been invested in real estate, &c., for the purposes of the public schools, under their control and possession as such commissioners, various citizens of Mobile, and others, had donated to their predecessors, in trust for the purposes of said public free schools, gifts amounting to many thousand dollars, some of which had been used, and the remainder invested in and about the purposes of the trusts confided to complainants as such school commissioners, &c.

Afterwards, upon the coming in of the answer of Putnam, without awaiting the answer of the other defendants, the chancellor, on motion in vacation, dissolved the injunction, and this decree is now assigned for error.

The opinion contains a synopsis of so much of the bill and the answer of Putnam as is material to a proper understanding of the decision.

P. HAMILTON, and RICE, SEMPLE & GOLDTHWAITE, for appellants.

ELMORE & GUNTER, and CHILTON & THORINGTON, *contra*.

PECK, C. J.—This case comes here on an appeal from a decretal order of the chancellor, dissolving an injunction heretofore granted, on the filing of the bill of complaint in this behalf.

Section 3439 of the Revised Code enacts, that such cases must be heard and determined at the first term of the court after such an appeal is taken.

The argument has just closed on this, the last day of the term, leaving but little time to consider and determine a question of so much gravity and importance.

From the best reflection we have, in so short a time, been able to give to it, we hold—1st, that “the Mobile school commissioners” constitute a public corporation, created for great public educational purposes, and that the charter of said corporation, being public in its character, may be altered and amended, at the will and pleasure of the general assembly of the State.—*The Trustees of the University of Alabama v. Winston*, 5 Stew. & Por. 17.

2d. That the funds provided for and devoted to the objects of this important trust, and which have been and are, from time to time, increased and augmented by the bounties and from the revenues of the State, although the State may not have the constitutional power to divert them from the purposes of the said trust, may, nevertheless, change the administrators of said trust funds, and, in her wisdom and discretion, direct the mode and manner of its administration, and how, and by whom, and to whom the funds devoted by the State for the purposes aforesaid are to be paid and applied.

3d. That the charter of said corporation does not constitute a contract between the State, on the one hand, and the said school commissioners on the other, the obligation of which is secured and protected from impairment by the constitution of the United States.

4th. That neither the present constitution of this State, nor the legislation of the board of education created by it, divert, nor are they designed to, nor have they or either

of them diverted, the said trust funds from the objects and purposes for which they were or are intended.

5th. That the bill of complaint, taken in connection with the answer of the defendant, said Putnam, does not show that the said trust funds have been, or are in danger of being, either wasted, diverted, or misapplied.

6th. That the educational institution in this behalf, with all other educational institutions in this State, are, legally, under the management and control of the superintendent of public instruction, and the board of education of this State, created by the constitution thereof; and that said board of education has full legislative powers in reference to it, and all other public educational institutions in the State, and that its acts, when approved of by the governor, or re-enacted, as provided in section 5 of article 11 of the constitution, have the force and effect of law, unless, and until, repealed by the general assembly.

For these, and other reasons not here named, we hold, that the said injunction heretofore granted was unadvisedly granted, and that the decretal order of the chancellor, dissolving the same, is right and free from error.

If it shall be deemed best, an opinion will hereafter be prepared and filed, setting forth more at length the reasons for affirming the order and decree of the chancellor in this behalf.

Let the decree of the court below, dissolving the injunction, be affirmed, and the appellants will pay the costs of said appeal in this court and in the court below.

NOTE BY REPORTER.—Upon the day upon which the foregoing opinion was read, the last day of the January term, the appellants petitioned for a rehearing, and afterwards filed the following argument in support thereof.

P. HAMILTON, and GOLDTHWAITE, RICE & SEMPLE, for appellants.—The principle upon which the bill rests is familiar, and is recognized and enforced in the *Mayor v. Rodgers*, 10 Ala. R. 37, and in the cases therein cited.

The corporation was created and its franchises conferred upon it, originally, by the act entitled “an act establishing



schools in the county of Mobile," approved January 10th, 1826, Pamphlet Acts of 1825-6, pp. 35, 36. The privileges or franchises thus granted, were not only continued, but added to, by successive acts of the general assembly of Alabama, down to and including the acts of 1854 and 1856. Pamph. Acts of 1853-4, pp. 190, 191; Pamph. Acts of 1855-6, pp. 148, 149.

Every thing (except "the funds arising from any sixteenth section,") which has heretofore been granted to said corporation, became [by mere force of the grant,] the property of the corporation, clogged only with the restrictions, that "the whole revenue arising to said board of commissioners shall be employed as a common fund for the instruction of the youth of said county;" and that no portion thereof shall be diverted to the maintenance or support of any school that is not strictly common to all children of the county, or to any that is under sectarian influence or control." And all this property, as well as revenue, "shall be under the control, direction and management of said commissioners," and be "appropriated and disbursed under the directions of the Mobile school commissioners."—See sections two and four of the act of 1854, above cited.

It is plain from the allegations of the bill, that Putnam and Cloud have heretofore acted, and are still continuing to act, in violation of these privileges or franchises conferred by statute upon the said commissioners; and that unless Putnam and Cloud are restrained, they will disable these commissioners from using these statute franchises or privileges. Cloud and Putnam, by their conjoint action, have already [as the bill shows,] diverted over \$5,000 of the trust fund, and are on the very eve of diverting nearly \$10,000 more of it, in defiance of the statutes above cited, and are continually pursuing a line of policy which destroys "the direction, control and management of said commissioners" over the trust fund, and the right of said commissioners to direct the appropriation and disbursement of each and every portion of that fund.

No plainer case can be made for one of these special injunctions, which will not be dissolved before the final

hearing. The very nature of the grievance is such, that the injunction is the whole case. To dissolve it on mere answer, before final hearing or proof taken, is to arm a conscienceless perpetrator of irreparable injury with the power of continuing his irreparable mischief by swearing to and filing an unconscientious answer.—*McBrayer v. Hardin*, 7 Iredell's Eq. Rep. 1; *Purnell v. Daniels*, 8 Iredell's Eq. Rep. 9; *Porr v. Carleton*, 3 Sumner's Rep. 70; *Maxwell v. Ward*, 11 Prince's Rep. 17.

In dissolving the injunction in vacation, the chancellor not only violated the salutary rule last above called to view; but he also violated this other plain and sound rule, to-wit, "that an injunction properly granted, is not to be dissolved until the answer of all the defendants [who are charged with a knowledge of the facts or participation in the wrong,] has come in."—*Depeyster v. Graves*, 2 Johns. Ch. R. 148, 149.

The bill shows that Cloud is at least equally guilty of the wrong with Putnam; in fact, that Putnam could not have consummated any wrong in the way of obtaining and diverting the fund, but for Cloud's furnishing him with the certificate or instrument, which was essential to obtain either a warrant from the auditor, or money from the treasurer. And yet, without any answer from Cloud, the chancellor dissolved the injunction upon the answer of Putnam only!

Cloud's failure to answer, authorizes the inference that he could not swear to any such answer as that put in by Putnam. Now, suppose Cloud had answered, and admitted the allegations of the bill; does not every chancery lawyer see that a dissolution of the injunction upon Putnam's answer would have been wholly erroneous? It is equally erroneous to dissolve upon Putnam's answer alone, before Cloud has answered, and before any proof taken, and before final hearing.

The answer of Putnam does not deny these specific acts of his and of Cloud, which acts, in law, amount to a diversion of the fund, and to an interference with the franchises of complainant.

Even if the bill is defective as to matters which are

amendable, the rule is, that on motion to dissolve an injunction in vacation, all amendable defects in the bill will be considered as amended.—*Alabama and Florida Railroad Company v. Kenney*, 39 Ala. Rep. 307.

From what has already been above laid down, it is clear, that the bill makes a plain case for relief by injunction. The natural inquiry then is, do the facts, or any of them, stated in the answer of Putnam, have the legal effect of overturning or barring the right apparent upon the bill.

It is obvious, that the right asserted by the bill can not be overturned or barred by anything contained in Putnam's answer, unless the aforementioned franchises, granted to said commissioners, by the statutes above cited, "to the control, direction and management" of said property and funds, as well as to the appropriation and disbursement thereof, has been destroyed by the present constitution of Alabama, or by some valid law enacted since the adoption of that constitution. If that franchise survives, if it still exists, there is nothing in Putnam's answer which can bar the right to an injunction which is disclosed by the bill.

We proceed now to inquire whether each of these franchises was destroyed by any thing contained in our present constitution. In pursuing this inquiry we must remember, that the destruction of those several franchises, is, inevitably, the destruction of a system of education originated in 1826, nourished and cherished certainly down to the adoption of the constitution; and during all that long period operating so benignly, that it received from the very convention which framed the present constitution, not only friendly recognition, but unqualified favor and sanction. [Ordinance No. 21, passed November 30, 1867.] Deprive the commissioners of "the control, direction and management," and of the appropriation and disbursement of the funds by which only the system has been and is supported, and the system which they have built up and perfected, necessarily perishes. It would be strange indeed, after reading ordinance No. 21, above cited, to impute to the convention which adopted it, an intention, in framing the constitution, entirely antagonistic to the intention plainly



evinced by that ordinance. The argument for defendant, in effect, charges the convention with entertaining at the same time, contradictory intentions, as to the same old and well known system for educating "the youth of the county;" and the intent to destroy this system, is imputed to a convention which not only, by ordinance, evinced its intent to preserve the system, but also to add to its efficiency.

Upon the principle, so well illustrated in *Horton v. Mobile School Commissioners*, that the special controls the general, and that repeals by implication, of special laws and special systems, will not be made out by mere general words; it becomes evident, that there is nothing in the constitution which can justly be held to operate as a repeal or destruction of the franchises of the said school commissioners, or the special system under their control. The words used in article eleven of the constitution are the only words from which such repeals or destruction is claimed to result; and these words are merely general, and can be reconciled with the continued special system in Mobile. Thus, the words of the first section are, "the common schools, and other educational institutions of the State." These are words of description and restriction merely; they were used to describe, not the ownership of the schools or other educational institutions, but to indicate clearly, that the constitution was not designed to include all the schools and educational institutions in the State. If the design had been to include all, the words would have been as follows: "the common schools and other educational institutions in the State." What was meant by the words actually employed, was, the common schools and other educational institutions which the State had generally supported or aided in supporting, and over which the State had retained general control, without ever having vested their control or management in any special body or by any special system; for all these may well be called schools or institutions "of the State." But as far back as 1854 the "school system of the county of Mobile" is spoken of in the statute law, as "a public school system of its own," [that is, of Mobile county.] Hence, the framers of the constitution treated it as a school system of that county; and desiring to leave it un-

touched, used words, schools and institutions of the State, so as to distinguish between them and the special system of that county.—Pamph. Acts of 1853–4, p. 17, § 2.

The next position understood to be taken by the counsel for defendant, is, that even if the constitution did not destroy the said franchises of complainant, the acts of the board of education effected this destruction.

Ordinance twenty-one of the convention plainly recognizes the complainant as a legally existing corporation, and expressly reasserts and secures the rights of “the school commissioners of said county of Mobile” under the said act of February 15, 1856, and amounts to a recognition and re-enactment of the provisions of that act. Ordinance No. 33, of the same convention, virtually prohibits the repeal of any ordinance of that convention, except “*by the the legislature of this State, two-thirds of each house voting for the same.*” This affirmation, that two-thirds of each house of the general assembly may repeal an ordinance, amounts to a *negation* of the right of the board of education to repeal one.—*Vallandigham's Case*, 1 Wallace, and cases there cited. And so, the act of the general assembly entitled, “An act to continue in force certain laws,” approved July 29th, 1868, virtually prohibits the boards from repealing any constitutional laws found in the Revised Code. Every such law is thereby declared to be of full force, until repealed by this (legislature) or some succeeding legislature.”—Pamph. Acts of 1868, p. 7. That act excludes a repeal by the board, of any law therein described.

The constitution does not confer on the board of education, the power to repeal or amend any ordinance of the convention, or any act of the general assembly. All the powers conferred on that board, by the constitution, must be held subordinate to the constitution and to the powers conferred by that instrument upon the general assembly. The constitution is not to be construed so as to make it the creator of two co-equal and co-ordinate legislatures upon any one subject. That would be not only absurd, but mischievous and destructive of that very harmony which it is the object of every government to secure. The relation established by the constitution between the board of edu-

cation and the general assembly, even as "to common schools and the educational institutions of the State," is that of inferior and superior ; substantially the same relation as exists when the general assembly [as it often has done,] confers upon a strictly municipal corporation [as a city or town] legislative or governmental powers within its corporate limits. It is well settled, that in such cases, the municipal corporation, however general may be the words granting its governmental powers, can not repeal or amend an act of the general assembly. The board of education is nothing more, in its very nature, than such a municipal corporation. True, this board is created by the constitution, and derives its powers from that instrument. But that fact does not alter its nature, or make it equal to, or co-ordinate with, the general assembly on any subject. The only effect of that fact, is, that the general assembly can not, by its mere act, take away from the board the powers which were really conferred upon it by the constitution ; whilst the general assembly may take away, by its own act, the governmental powers which it had conferred by its own act, upon any municipal corporation.

This view becomes conclusive upon a careful examination of article 11, of the constitution, in connection with articles 3 and 4. The two articles last mentioned clearly vest in, and confines to, the general assembly the whole legislative power of this State. Then the first section of article 11 proceeds to place the common schools and other educational institutions of the State, "under the management of a board of education ;" and section 5, of this last mentioned article, declares that "the board of education shall exercise full legislative powers in reference to the public educational institutions of the State." It is argued, that no limitation can be put upon these words, "full legislative powers." If this were so, it would follow that the board might exercise legislative powers, the exercise of which is prohibited both by the constitution of this State, and the United States. This can not be. The truth is, these words, however sweeping they may appear to be, are subject to limitations. These limitations are to be ascertained by the nature, provisions, and end of the entire



instrument in which they are found, and by the established rules for construing such instruments and such general words, when found in such instruments. Guided by such considerations, the conclusion is easily reached, that the phrase "full legislative powers" occurring in the said 5th section of article 11, must be construed to mean no more than such "full legislative powers" as may be necessary and proper to secure to the board of education merely "the management" of the educational institutions "of the State," embraced and mentioned in the first section of that article, and which at the same time must not be in conflict with any provision of any act of the general assembly, or of the constitution of this State, or of the constitution of the United States. This is the only construction which can harmonize the various provisions of the constitution of the State, and allow some operation or effect to each sentence, clause, and word, thereof. To effect such harmony, it is not unusual, but always proper, to narrow and limit the apparent scope of such sweeping words.—*May v. Robertson*, 13 Ala. R. 86.

This construction leaves a field of operation useful if not extensive—field of "management"—to the board of education; a field by the wise cultivation of which "the general interest of education" may be favorably "affected;" but by the unwise cultivation of which "the general interest of education" may be most unfavorably "affected." Hence, the constitution imposes many restraints upon the board of education in this their appropriate field of legislation. Among these are the following: That "no rule or law affecting the general interest of education shall be made by the board without the concurrence of a majority of its members;" that its acts shall have the force and effect of law, only "when approved by the governor, or when re-enacted by two-thirds of the board in case of his disapproval."—(*Vallandigham's Case*, 1 Wallace;") that all its acts may be "repealed by the general assembly;" that "the style of all acts of the board shall be, 'Be it enacted by the board of education of the State of Alabama;'" and that "the board of education shall meet annually at the seat of government, at the same time as the general assembly; but

no session shall continue longer than twenty days, nor shall more than one session be held in the same year, unless authorized by the governor."

This power of "management," which is the power conferred upon the board, so far from including the power to destroy any of the existing educational institutions of the State, imposes upon the board the duty of preserving them, and each of them. There is not a line or word in the constitution which gives to the board the power to destroy one of those institutions. But the clear intent of that instrument is, that the board may create schools and school districts—that the board must increase, but should not diminish the number of such institutions which it found in existence. This power to create, is expressly given in the 6th section of article XI. Is it not significant, that this power to create is expressly conferred, and that the power to destroy is not to be found in the instrument?

The following propositions are deemed incontrovertible, to-wit: 1st. That the constitution does not empower the board of education to repeal or amend or interfere with any ordinance of the convention which framed it or any act of the general-assembly; 2d. Ordinance No. 33 of that convention virtually prohibits any repeal of any ordinance of said convention by said board; 3d. The above mentioned act of the general-assembly of July 29th, 1868, virtually prohibits the repeal by said board of any constitutional law found in the Revised Code of Alabama.—Pamph. Acts of 1868, p. 7; 4th. Ordinance 21 of said convention, in its title as well as in its body, recognizes the legal existence of the Mobile school commissioners, and the existence of the rights of that corporation or "board" under the statute law which was enacted before the war; 5th. The Revised Code, as adopted by said act of July, 1868, clearly recognizes the continuing legal existence of the "public school system" in the county of Mobile under statutory law passed before the war; section 991 of that Code is in the following words, to-wit: "As the county of Mobile now has established a public school system of its own, the provisions of this chapter shall apply to that county only so far as to authorize and require its school

commissioners to draw the portion of the funds to which that county will be entitled under this chapter, and to make the reports to the superintendent" (not county, but State superintendent) "herein required;" 6th. On the supposition that the matters pertaining to said school commissioners of Mobile, may be included among "the municipal affairs of Mobile," it is clear, that the act of the general assembly of August 6th, 1868, entitled "an act to provide for the qualification and appointment of State, county and municipal officers," carefully recognizes these affairs as legally existing, and provides "that nothing in that act shall be so construed as to interfere" with them.—Pamph. Acts of 1868, pp. 32, 33.

Notwithstanding these several recognitions by the convention which framed the constitution, and by the first general assembly thereunder, the board of education assumed that it had the power to change or destroy the system of public schools in Mobile which had been so long established, and which had been thus recognized by the convention and the general assembly. That board also assumed that it had the power to repeal any act of the general assembly "pertaining to the subject of education or in any way connected therewith."—(See the acts of that board purporting to be laws made by it, in the summer of 1868, and also its subsequent acts and resolutions.)

These acts, as well as resolutions of the board of education, in so far as they assume to impair the force of any ordinance of the convention, or any act of the general assembly, are utterly void, upon the grounds herein above disclosed. But independently of these grounds, these acts and resolutions are null and void, for other reasons hereinafter set forth.

Every act passed by the board of education in the summer of 1868, (except the single one which purports to have been approved July 30th, 1868, which makes provisions as to surplus moneys belonging to the school fund of the State of Alabama, and which certainly has no bearing on the present case), was passed more than twenty days after the day by law prescribed for the first meeting of the general assembly! and is, for that reason, unconstitutional



and void.—See article 4, section 21, and article 11, section 9, of the constitution.

The day “by law prescribed” for the first meeting of the general assembly, was the 13th day of July, 1868. That day was prescribed by, or (what is the same thing) in pursuance of the law of congress which validified our constitution and admitted Alabama and other southern States to representation in congress; which law took effect on the 25th day of June, 1868.—Pamph. Acts of Congress of 1868, pp. 73, 74.

The general assembly actually had its first meeting on the day thus prescribed. Whether the board of education actually met on that day or not, is wholly immaterial. The “twenty days” which the constitution mentions as the duration of its session, began to run on that day, and continued to run until they ran out, whether the board was actually in session or not on any one of these “twenty days.” The board could not stop the operation of the constitution by its failure to meet “at the same time as the general assembly.” In counting these “twenty days,” the courts can not except Sundays, because the constitution does not except Sundays in counting these “twenty days.” Wherever the constitution authorizes Sundays to be excepted, it makes the exception in express terms; for example, in counting the “five days” during which the governor may keep a bill which has passed both houses of the general assembly, the constitution expressly says, “Sundays excepted.”—Art. 4, § 16.

The act of the general assembly entitled “An act to fix the day for the annual meeting of the general assembly of the State of Alabama,” approved July 24th, 1868, furnishes no escape from the conclusion above reached, that the “twenty days” began on the 13th day of July, 1868, and continued to run, including Sundays, until the “twenty days” had run out. That act speaks only from the day of its approval—that is, from the 24th day of July, 1868, and all it does say is as follows: “Section 1. Be it enacted by the general assembly of Alabama, that the 13th day of July is hereby declared the day for the annual meeting of the general assembly of the State of Alabama.” That act

does not purport to be retrospective in any respect whatever. It does not say that the 13th day of July, 1868, shall be deemed and taken to be the day on which this general assembly began its annual meeting. The courts are bound to treat the act as prospective only, and as fixing the day on which any future annual meeting of the general assembly should commence. And this would have been its effect, if it had not been repealed before July 13th, 1869, and a different day prescribed for the meeting of the general assembly. This will be clear to all who notice that the constitution does not require that the general assembly shall meet on the same day in every year, but only that it "shall meet annually, on such day as may be by law prescribed."

Besides all this, the day "fixed for the first meeting of the legislature" of this State, under the constitution of this State, was fixed by the very act of congress which imparted validity to that constitution, and was so fixed in lieu of and substitution for the 18th day of March, 1868, the day which had been fixed by ordinance No. 32 for the first meeting of the legislature; which last named day had passed before congress ratified the constitution. The act of congress which thus fixed the day, is conceded on all hands to be constitutional, and is therefore paramount to, and supreme over, any State law on that identical subject. The general assembly in 1868 could not unfix the day for its first meeting, because congress had fixed it as aforesaid. The meeting of the legislature on that day was the commencement of the first annual session of the general assembly.

Another fatal objection exists to the validity of the acts of the board of education, as laws "of this State," or as having "the force and effect of law;" and it is equally applicable to all its acts and resolutions, whether passed in the summer of 1868 or subsequently. It may be intelligibly stated in the form following, to-wit:

The second section of the fourth article of the constitution explicitly provides, that "the style of the laws of this State shall be, "Be it enacted by the general assembly of Alabama." The fifth section of the eleventh article of the

constitution, after first providing that the board of education shall exercise full legislative powers in reference to the public educational institutions of the State, immediately qualifies that language by the following, to-wit: "and its acts," [that is, the acts of said board of education,] "when approved by the governor, or when re-enacted by two-thirds of the board, in case of his disapproval, shall have the force and effect of law, unless repealed by the general assembly." Now, here is a plain distinction drawn between those things which really are "the laws of this State," and those things which at best can only acquire "the force and effect of law," upon the occurrence of one of two well defined contingencies; that is, "when approved by the governor, or when re-enacted by two-thirds of the board, in case of his disapproval."

It is not, in all cases, essential to the validity, or efficacy of a bill or resolution which has passed both houses of the *general assembly*, that the governor's approval thereto should appear, or *should have been, in fact, given*.—See Pamph. Acts of 1868, p. 134. The 16th section of the 4th article of the constitution provides, that "if the bill or resolution shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, *it shall have the same force and effect as if he had signed it*, unless the general assembly, by its adjournment, prevent its return, in which case it shall not be a law." There is no like provision in the constitution, as to any act of the board of education. The provision as to acts of that board is quoted above; the effect of which is, that its acts can in no case acquire even "the force and effect of law," except "when approved *by the governor*, or when re-enacted by two-thirds of the board, in case of *his* disapproval." And this being so, the plain sequence is that no one of its acts can have the force and effect of law, unless it affirmatively appears, either that the governor has actually approved it, or that, after its actual disapproval by him, it was "re-enacted by two-thirds of the board." The numerous decisions, relating to the presumptions as to validity and jurisdiction which will be indulged where the acts of courts of *general jurisdiction* are drawn in question,



but will not be indulged where the acts of courts of *special jurisdiction* are drawn in question, furnish the apt illustration of the difference between the acts of the general assembly and the acts of the board of education. As to the acts of the general assembly, the presumption is always in favor of their validity, until the contrary appears. As to the acts of the board of education, there is no presumption in favor of their validity; and they must be treated as invalid unless their validity affirmatively appears.—*Thompson v. The Commissioners' Court*, 18 Ala. Rep. 694; *Mollett v. Keenan*, 22 Ala. Rep. 484.

Whoever claims under an act of that board, must plead it, and in his pleading must aver every thing essential to its validity. If he does not *allege* the facts essential to its validity, he can not be permitted to prove them; nor can the court judicially take notice of any such essential fact, which is not alleged. This rule applies with peculiar force to a motion, made in vacation, to dissolve an injunction upon the mere answer of defendant. On such motion the defendant can not be permitted to avail himself of any fact not disclosed on the pleadings. The defendant here has not set up in his answer the facts essential to the validity of the acts of the board.

Another fatal objection to a large number of the acts of the board of education, is the plain disregard by that board of the following unbending rules established by the constitution, to-wit:

1st. "Each law shall contain *but one subject*, which shall be *clearly expressed in its title*."

2d. "No law shall be *revised or amended* unless the new act contains the *entire* act revised, or the section or sections amended; and the section or sections *so* amended shall be repealed."

The *resolutions* purporting to be adopted by the board of education, have not even a semblance of validity. There is nothing in the constitution which authorizes the board to pass any *resolution* which can possibly have the force and effect of law. But, on the contrary, the plain provision of the constitution is, that "the style of *all* acts of the board shall be"—"Be it enacted by the board of education

of the State of Alabama." In addition to this, the *resolutions* of the board do not even purport to be approved by the governor. And even its *acts* do not, as published, appear to have been approved *by the governor*. They simply purport to be "approved;" but do not show *by whom* they were approved. And *no presumption* can be indulged by the court, that the approval was by the governor.

The only other questions which will be discussed, are—1st, whether the several acts in relation to the Mobile school commissioners, passed by the general assembly of Alabama *before the war*, did not amount to a *contract* which was within the protecting power of that clause of the constitution of the United States which forbids any State from passing any law impairing the obligation of a contract; 2d, whether the success of the defense set up by Putnam's answer in this case, would not amount to a violation of the 14th amendment of the constitution of the United States, which prohibits a State from depriving "any person of life, liberty, or property, without due process of law," or from denying "to any person within its jurisdiction the equal protection of the laws," or to a violation of the provision of the constitution of the United States, which forbids the impairing of a contract by any law of a State.

We will not argue at length upon either of these last stated questions. But we respectfully ask the examination of the authorities we cite, to prove that the rights, franchises, and privileges conferred upon the complainant and its officers, are, under the constitution of the United States, as well as of this State, beyond impairment, either by its general assembly or convention; and *a fortiori* by the board of education.

"The incorporated trustees (the school commissioners here are such) *form a third party to the contract*, which, there being *no reservation* to that effect, can no more be dissolved or changed, than it could have been originally made, *without their consent*."—Abbott's Digest of Law of Corporations, p. 158, section 123, referring to *City of Louisville v. University of Louisville*, 15 B. Monroe, 642.

The facts in the case last cited, like the facts in the present case, are essentially different from the facts upon

which *Trustees of the University of Alabama v. Winston*, 5 Stewart and Porter, p. 17, arose and was decided. Conceding this last mentioned case to have been correctly decided, it can not possibly control the present case, as will become evident upon comparing the grants and facts in the two cases together. The difference between them is clear ; and will be thoroughly seen and felt by an examination of the following authorities, which do apply to and ought to control the present case.—*Trustees for Vincennes University v. The State of Indiana*, 14 Howard, 276 ; *The Regents v. Williams*, 9 Gill and Johnson, 397 ; *Sheriff et al. v. Lowndes*, 16 Maryland Rep. 276 ; *Cleveland v. Stewart*, 3 Georgia Rep. 283 ; *The Trustees, &c., v. Bradbury*, 11 Maine Rep. (2 Fairfield) 119, and cases there cited ; Abbott's Dig. Law of Corp. pp. 160, 161, §§ 138 to 141 ; *Ibid*, 165, § 168 ; *Ibid*, 157, §§ 115, 116 ; *Ibid*, 158, §§ 123, 124 ; *Home of the Friendless v. Rouse*, December term, 1869, U. S. Supreme Court ; *State v. Heyward*, 3 Richardson Law Rep. (So. Ca.) 389, and cases there cited.

The corporation which sues in this case, is not strictly a public corporation. In the language of Chancellor Kent : "To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke."—2 Kent's Com., 9th edition, marg. pp. 275-6, 305-6. In those public corporations, which are subject to legislative control, "there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public ;" consequently, there is nothing of contract in them. But in the present case there is a contract ; there are grants of property and of franchises, coupled with an interest, not in the children of the State generally, but only in the children of a single county ; these grants have been accepted, and these are beyond legislative control. To divest this corporation of such rights, privileges, and immunities, or the children of Mobile of such interest, is the exercise of *judicial* power.—2 Kent's Com., 9th edition, marg. p. 275, § 306 ; *Town of Pawlet v. Clark*, 9 Cranch's



Rep. p. 292 ; *State v. Heyward*, 3 Richardson's Law Rep. p. 389.

The following response was made to appellants' petition for a rehearing at the present term by—

PECK, C. J.—This case was disposed of at the last term, affirming the decree of the chancellor, dissolving the injunction granted on the filing of appellants' bill.

A petition for a re-hearing has been filed, and as the court had but little time then for the consideration of the questions involved, and none, for writing out the reasons that led to its conclusions, we propose now, in connection with the application for a rehearing, to give the case a more careful examination.

The first question then decided, is, "that the Mobile school commissioners constitute a public corporation, created for great public educational purposes, and that the charter of said corporation, being public in its character, may be altered or amended at the will and pleasure of the general assembly."

This is altogether the most important question in the whole case, and lies at the foundation of all the others, and if the conclusion to which we then arrived, be right, the difficulties in the case may be considered substantially removed, and the other part of the decision can hardly be wrong.

In determining the character of this corporation, we must discover, if possible, the intention of the legislature, and if that can be ascertained, we are bound to give it effect, if not in conflict with the constitution, whatever may be our opinion of its wisdom or policy.—*Bray et al. v. Edie*, 1 Term Rep. 313.

Blackstone, in his Commentaries, says, "the fairest and most natural method to interpret the will of the legislator is, by exploring his intentions at the time when the law was made, by signs the most natural and probable, and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of them all."—2 Blackstone's Com. pp. 59, 60.

For this purpose, it is not improper to consider the state and condition of the city and county of Mobile, at the time the first act was passed, in the year 1826, entitled, "An act to establish schools in the county of Mobile."—Acts of 1826, p. 35.

Alabama had then been a State for about six years ; it had not at that time any general system of public schools or education. The city of Mobile was comparatively a small town, and the inhabitants of the city and county, not one-fourth the present number, and the present number is, in all probability, not one-fourth what it will be fifty years hence. It was, however, an important place, and looked to, as soon to become the emporium of a great and prosperous State, numbering its inhabitants by hundreds of thousands.

Is it reasonable to presume, that the legislative body, by which that act was passed, supposed they were committing to a mere private corporation, for all time to come, the great trust of the public education, for so important a portion of the people of Alabama ; and that, too, in such a way as to put it beyond the care and control of the legislative authority of the State ? Such a presumption is altogether unreasonable—*perpetua lex est nullam legem, &c.*—and should not be entertained, unless the language employed is so clear and definite that no other rational interpretation can be given to it.

A fair interpretation of the whole act itself, will show that no such intention or purpose was contemplated, but, on the contrary, that the legislature intended to create a public board of commissioners, to be appointed by itself, and whose successors were to be elected by the people of the said city and county, as other public officers were elected ; and that they were to have and exercise the powers conferred upon them by said act, for the purpose of establishing *public schools*, and to devise, put in force and execute, such plans and devices for the increase of knowledge, educating youth, and promoting the cause of learning in said county, as to them might appear expedient ; and that this was to be done as a matter of public concern, and not

for private benefit or emolument ; in other words, it was to be a public institution, and not a private corporation.

The commissioners to be appointed, were to have no private interest in the funds to be devoted for that public object and purpose, which were to be derived wholly from the bounties of the State and the United States, and certain revenue accruing to the treasury of said county from fines and forfeitures, a taxed fee of two dollars on all suits, in the circuit and county courts, together with twenty-five per cent. of the ordinary county tax of said county ; all of which were set apart as a fund, not for the benefit of the commissioners, but as a special fund for the endowment and support of schools in said county.

No provision is made by which private bounties or benefactions were to be received, or used—the commissioners contributed nothing as individuals. There was neither stock nor stockholders ; nor was any consideration paid by them, or by any other person, for the charter of incorporation, if such it can properly be called ; it was wholly a matter of public concern, and for public benefit, and consequently, nothing in the nature of a contract was created between the State and said commissioners, or the people of the city and county of Mobile, either as a body corporate or as individuals. It was, and was intended to be, in all its essential characteristics and attributes, a public institution or corporation, created for public purposes, and, therefore, subject to be altered, amended, or even repealed, by the legislature.

The act provides that the number of commissioners should not be less than thirteen, nor more than twenty-five ; and that seven members should constitute a quorum ; that the board might appoint and employ a treasurer, and such other officers and servants as to them might appear proper, who should perform such duties and give such bonds as might be required by said board ; that they should have the power to make by-laws and regulations, not inconsistent with the laws of the State or the United States, and to revoke and alter the same, and to prosecute all suits and actions in their corporate names, in the same manner as private persons. Nothing is said in said act as



to how they might be sued, or the manner of defending suits brought against them, if liable to be sued in their corporate name at all; these seem to have been the powers deemed necessary, to enable them to carry into effect the system of public schools intended to be established in and for the city and county of Mobile. The act then names twenty-four persons to constitute said board of commissioners. It is manifest, these persons so named were understood to be *mere public officers or servants*, without any private interests or property in said system of public schools, nor had they, like private corporations, any power to perpetuate themselves as a board of education, to appoint or elect their successors; that was to be done by the people by general ballot, in the same way and at the same time that the representatives of the general assembly were to be elected; these provisions are inconsistent with all our notions of a private act of incorporation; such provisions would utterly destroy the prosperity, and bring ruin upon any private corporate enterprise. We therefore hold, that this act created, and was intended to create, a system of public schools then believed to be necessary, for the people of the county of Mobile, and that the legislature retained the power to alter, amend, perfect, or repeal the same, as might in the future be thought best for the public good.

To prove the correctness of this conclusion, we propose to examine the subsequent legislation on this subject, from time to time, up to the adoption of the present constitution of the State.

The first act that we find relating to this matter is an act entitled "An act to authorize the Mobile school commissioners to raise a sum of money by lottery," approved 12th January, 1827.—Acts 1827, page 31. By this act, the said commissioners were authorized to raise by lottery the sum of \$25,000, in aid of the fund for the support of schools in said county.

In 1841, an act was passed entitled "An act to extend the time for collecting the county *school* and road tax in the county of Mobile, for the year 1841, and for other purposes," approved December 10, 1841. By the 3d section, the tax collector for the county, for the year 1842, and

thereafter, was allowed until the 1st day of January in each year to make payment of the county, school and road tax of said county.

In 1845, another act was passed, entitled "An act to alter the organization of the board of commissioners of roads and revenue of Mobile county," approved 27th January, 1845. By the 5th section, the school commissioners of Mobile county were authorized and empowered to lease for a certain period, not exceeding five years, any lands appertaining to schools, for such rents and improvements as they might deem sufficient to the school fund; and by this section it is declared that five *members* shall constitute a quorum of said board of commissioners, instead of *seven*, as provided in said act of 1826.

By the 6th section, one-half of one per cent. is taxed upon sales by auctions, &c., in favor of said school fund, to be paid monthly to the officer appointed by said board to collect the same, and in case of refusal on demand, &c., said officer, on ten days notice, might move for judgment in the circuit or county court, against parties in default.

In 1852, an act was passed, entitled "An act to amend the laws regulating the board of Mobile school commissioners," approved February 9th, 1852.—Acts 1851–52, p. 463. The 3d section requires teachers in said county, before receiving any portion of the school fund of Mobile county, to procure from said board of school commissioners a certificate of competency, &c.

The 4th section altogether re-organized the said board of school commissioners, changing their number from not less than thirteen, and not more than twenty-five, to consist of twelve members only, one-fourth of which number were required to be from the country portion of the county, and to reside at least seven miles from the city of Mobile; and directs that on the first Monday in August, 1852, there should be eight of said board elected by the qualified electors of said county, two of whom should reside more than seven miles from said city; that these eight, or a majority of them, should meet together and elect by ballot four members from the old board of school commissioners, one of whom should be from the country portion of said county,

which, with the eight, should compose said new board. Said new board is then required to be divided into three classes, one of which to be elected every two years by the qualified electors of said county, &c.

All this was done without asking the assent or consent of the old board, or of the people of the city or county of Mobile. This clearly could not have been done, if the said commissioners had been a private corporation, and this being done without consent or objection on the part of the old board, shows conclusively, as we think, that both the legislature and the old as well as the new board of school commissioners, and the people of said city and county, held and understood the said system of public schools of said county to be a public institution, altogether within the power and under the control of the legislature, to mould and fashion it, or to abolish it altogether, as might be thought best to promote the public good, and in no wise a private corporation, that could not be meddled with by the legislature, without the request or with the consent of the corporate body itself.

Again, in 1854, another act was passed, entitled "An act to regulate the public schools in the county of Mobile," approved 16th January, 1854.—Acts 1853-4, p. 190. This title itself very sufficiently shows that what was to be regulated, was not the affairs of a private corporation, but a general system of public schools for the people of said county.

The first section provides, "that all laws and parts of laws relating to the establishment, organization and revenue of the board of school commissioners of the county of Mobile, excepting only the act entitled "An act to amend the laws regulating the board of Mobile school commissioners," approved February 9th, 1852; and the act entitled "An act to change the mode of receiving and disbursing the revenue of Mobile county, and for other purposes," approved February 9th, 1852, be and the same are hereby repealed.

Here, we see, the legislature went beyond amendment merely, and repealed the original act of 1826, by which the system was first called into being, and all the several acts



that followed it, except the two acts of 1852, above mentioned, and proceeded to authorize the board of Mobile school commissioners, as thus organized and existing, to establish and regulate a system of public schools in said county of Mobile, as to them might appear expedient, increasing their powers, and multiplying and enlarging the revenue to be devoted to that object and purpose, and providing that no portion of said revenues should be devoted to the maintenance or support of any school, not strictly common to all the children of said county, or that should be under sectarian influence or control.

The third section provides that said commissioners might elect, from their own body, a president and vice-president, and that said officers should serve, without compensation, and hold their offices for the term of two years. This act is a long one, covering about six pages, and it will be very imperfectly understood by fragmentary extracts from it; we, therefore, refer to the whole act. To us, it seems inconceivable that any real doubts should exist as to the character of the corporation created by it. It is unquestionably a public and not a private corporation, and it bears on its very face the evidence that the legislature intended to retain the power to alter and amend it, as time and experience might suggest, to improve and perfect it as a public institution. That such were the intentions of the legislature, we refer to section seven, which, among other things, requires the said board to keep full minutes of their proceedings, in well bound books, and, also, that they should annually transmit to the secretary of state, to be laid before the general assembly at its regular session, a full *statement of their receipts, disbursements and transactions* during each and every year. Is not that a clear indication that the general assembly did not intend to part with the power of legislation over the subject of public schools in the city and county of Mobile?

On the 14th of February, 1856, an act was passed, entitled "An act to render more efficient the system of free public schools in the State of Alabama."—Acts 1855–56, p. 33. By this act, a general system of free public schools was established in this State.

Article 1st of this act created a fund known as the educational fund, for the maintenance and carrying into effect said general system of education, after naming eleven different sources from which said fund was to be derived. The first section provides that the money composing said fund should be drawn from the treasury of the State, (except in the cases where it was otherwise ordered by said act,) and disbursed in the manner thereafter directed.

Article 2d declares, that for the uniform and efficient administration of the system, the following officers should be appointed, with the powers and duties, and according to the manner herein provided :

1st. A superintendent of education throughout the State.

2d. A county superintendent of free public schools in each county.

3d. Three trustees of free public schools in each township.

The manner of electing these several officers is provided for in said act, and their duties prescribed.

The second section of article six of this act is as follows, to-wit : That as the county of Mobile now has established a public school system of its own, the provisions of this act shall apply to that county only so far as to authorize and require its school commissioners to draw the portion of the funds to which that county will be entitled under this act, and to make the report to the superintendent herein required.

The legislature that adopted that general system of public schools for the State, no doubt thought best to leave the system of public schools for the county of Mobile substantially unchanged, but no legitimate inference can be drawn from this, that it was understood or believed by that body, that it had not the power to change or abolish it, and to put it upon the same footing with the other counties of the State, if it had been thought wise and best to do so. We think the clear inference the other way, for the section cited does change that system in one respect, and if it had the power to change it at all, and impose any new duties upon the school commissioners of said county, it clearly had the power to change or suspend it altogether,

and to make the new system apply to said county, in all respects, as it applied to the other parts of the State.

The foregoing is, we believe, a true historical statement of the legislation as to the public schools in the said county of Mobile, beginning with the said act of the 10th January, 1826, entitled "An act establishing schools in the county of Mobile."

To carry into effect the purposes of the legislature, a board of commissioners were appointed by the name and style of "the Mobile school commissioners." The act nowhere calls this board a corporation, but the sixth section says, the board shall have power "to prosecute all suits and actions in their corporate name, in the same manner as private persons." By reference to the books, the real legal character of this board will be readily discovered; it was not, accurately speaking, a corporation in its completeness. It was invested with some of the powers and attributes usually exercised by corporations, but with such only as were thought necessary to enable it to accomplish the work for which it was created. There are many kinds of corporations, and one division of them is into public and private corporations, proper. There may be, oftentimes, more or less difficulty in determining whether a particular corporation is public or private.

Besides corporations, properly speaking, sometimes persons have a corporate capacity, for particular specified ends only, and are, therefore, called *quasi* corporations. Chancellor Kent, speaking of this kind and species of corporations, says: "In New York, each county, and the supervisors of a county, the law officers, and commissioners of lands, and the supervisors of towns, the overseers of the poor, the commissioners of common schools, commissioners of highways, and trustees of school districts, are invested with corporate attributes, *sub modo*."—2 Kent's Com. p. 278.

And on page 273 he says, besides the proper aggregate corporations, the inhabitants of any district, as counties, towns and school districts, incorporated by statute, with only particular powers, are sometimes called *quasi* corporations; and as to these, he says, "no private action, unless



given by statute, lies against them as such corporations." It necessarily follows, that such corporations are public in their character, and, therefore, subject to legislative control. These are manifestly not the only corporations of this sort, but are referred to as examples.

In the case of the *Trustees of the University of Alabama v. Winston*, 5 S. & P. 17, the main question upon which the merits of the case depended, was as to the character of the plaintiff, whether a public or private corporation. On this question, Judge Taylor, delivering the opinion of the court, says: "If the property possessed by a corporation, is altogether the property of the State; if the corporators have paid nothing, amounting to a *valuable consideration*, for the act of incorporation; in fine, if there is no contract upon valuable consideration, between the State and the corporators, it is a public corporation, and if it be public, it is certainly within the complete control of the general assembly."

We think, there can be no reasonable doubts as to the character of the school commissioners of the county of Mobile; they were a mere *quasi* corporation, and in the words of Judge Taylor, "within the complete control of the legislature." We also hold, that the system of public schools brought into existence by said act of the 10th of January, 1826, and as changed, amended, re-organized and continued by subsequent legislation, up to the time of the adoption of the present constitution, was an educational institution of this State, and by the 11th article, § 1, of the constitution, was placed under the board of education.

This article must be construed in connection with the other parts of the constitution, and given a practicable, common sense interpretation—an interpretation that will enable the board of education to perform and accomplish the great work committed to its charge; that is, the management of the common schools, and the other public educational institutions of the State.

We have carefully examined the argument of the learned counsel of the appellants upon this subject, and feel constrained to hold it to be hypercritical, and if adopted as

the true meaning of this article, it will cripple, if not destroy its usefulness, and render the administration of the system of education, intended to be built upon it, a disappointment and a failure.

The language of the first section of this article includes and embraces the common schools, and all the other public educational institutions of the State. It does not include private schools, conducted by individuals for their own profit and emolument, nor educational institutions, founded upon, and supported by private capital or endowments, although incorporated by the State, and, therefore, in a limited sense, public in their character. This is the view taken of it by the board of education, and we think correctly, as appears by section four of the act entitled "an act to secure co-operation with the bureau of refugees, freedmen and abandoned lands, and the several aid societies," approved 11th August, 1868. This section declares, "that all the schools of the State of Alabama, not maintained by private teachers for their benefit, shall be under the general direction of the board of education, and conducted as far as practicable, on the same general plan."—Act, 1868, p. 160.

The great system intended to be inaugurated under this article of the constitution, it was foreseen, would require legislative aid and assistance. This might have been left to the general assembly, but the convention, no doubt, believed the general assembly would be, to a great extent absorbed, and their time mostly employed with the many other subjects requiring legislation, and if not, its members would not so well know and understand the particular legislation necessary, to promote the best interests of education, as a board elected from all the congressional districts of the State with a view to their fitness, and having under their immediate management and supervision, the entire system itself; and, moreover, the members being elected for four years, would have an experience hardly to be looked for in an ordinary legislative body.

For these, or for other reasons, satisfactory to the convention, the board of education, by the fifth section of this article, is clothed and invested with full legislative pow-

ers in reference to the public educational institutions of the State.

These full legislative powers cover the entire field of legislation upon this subject, including the officers and agents to be employed, the mode and manner of their election, or appointment, the tenure of their respective offices, their duties, compensation, and for what causes, and by whom, they may be suspended or removed from office; these and any other matters requiring legislation, are necessarily embraced by the expression, "full legislative powers." "Full legislative powers," as here used, mean ample, complete, perfect powers, not wanting in any essential quality; otherwise, they would be limited, and not full powers; whatever, therefore, the general assembly might have done, if legislative powers had not been conferred upon the board of education, may be done by said board, in reference to the common schools, and other educational institutions of the State. Said board was not created to conduct and manage the old systems of education; they have the power to adopt such parts thereof, as they think proper, or to reject them altogether.

The fifth section of this article, not only confers upon this board full legislative powers, but declares that its acts, when approved by the governor, or when re-enacted by two-thirds of the board, in case of disapproval, shall have the force and effect of law, unless repealed by the general assembly. The general assembly has the power to repeal them, that is all; but, until repealed, they have the same force and effect as the acts of the general assembly itself. Furthermore, they are to be treated as public, and not private acts, and the courts will take judicial notice of them as they do of the other public laws of the State.

From the foregoing considerations, we perceive:

1st. That the board of commissioners, known by the name of "The Mobile School Commissioners," as created by the act of the 10th of January, 1826, was an irregular *quasi* corporation, public in its character, and so continued, under all the legislation in relation thereto, down to the adoption of the present constitution of the State, and, therefore, at all times subject to legislative control.



2d. That said corporation was created for public ends and purposes, and not for private benefit or emolument, and, consequently, no contract existed between it and the State, the obligation of which is secured and protected from impairment by the constitution of the United States.

3d. That by the said act of 1826, and by those that followed it on the same subject, a system of public schools and education was instituted and perfected for the benefit of the people of the county of Mobile, and was placed under the superintendence and management of said board of school commissioners, who received the funds and endowments provided for that purpose, and administered them, not on their own account, but for the public good, and, therefore, had no private interest in the same.

4. That by the said act of the 14th of February, 1856, a system of free public schools was established in this State, the first section of which declares that to carry into effect the provisions of our State constitution, which wisely declares that schools and the means of education shall forever be encouraged in this State, "to realize the objects of the general government in making grants and appropriations for the establishment of schools in each township, and to extend upon equal terms to all the children of our State the inestimable blessings of liberal instruction, the following system of the free public schools is hereby established in this State, and shall have the force and effect of law after the passage of this act." This system was provided for the State at large, but by section 2, article 6, it is enacted: "That as Mobile county now has established a public school system of its own, the provisions of this act shall apply to that county, only so far, as to authorize and require its school commissioners to draw the portion of the funds to which that county will be entitled under this act, and to make the reports to the superintendent herein required."

By the seventh section, article 6, money in the State treasury for educational purposes, was to be drawn by the county superintendents for their respective counties, except the county of Mobile; for that county, it was to be drawn

by the school commissioners, as stated in section 6, above copied.

5. By our present constitution, an educational system is provided for the entire State, and neither Mobile nor any other county is excepted or exempted from its provisions ; all are embraced within it. This new system is essentially different from the systems that existed before it, created for the county of Mobile, and the State at large, and, consequently, they can not stand together. The old systems are necessarily repealed by the new, only continuing to enable the officers of the old systems to settle with and turn over the moneys and other things in their hands to the persons entitled to receive them under the new system. The old systems were beings of legislative creation, and existed by legislative permission, and were merely *administrative* in their character. The new has deeper foundations and powers unknown to the old systems ; it has not only administrative, but full legislative powers as to all matters having reference to the common schools, and the public educational institutions of the State.

It cannot be destroyed, nor essentially changed by legislative authority ; and, even the funds for its support do not depend upon legislative bounty, but are mainly provided by the constitution itself ; this new system has, therefore, independent, permanent, constitutional existence, deriving its being and receiving its powers from the constitution, and not from the legislative authority of the State.

Having this understanding of the educational systems of the State, as they existed before and since the adoption of the present constitution, we are the better prepared to examine and comprehend the case made by the complainants, and the defense set up to defeat the relief sought by the bill of complaint.

1. The bill is filed in the name of certain persons claiming to be "The Mobile School Commissioners," a corporation created and recognized by the laws of the State of Alabama, and states that by the laws thereof they are entitled, as they believe, to the regulation, control and

management of the public schools, and public school system in the county of Mobile.

2. That the public schools in Mobile county are separately organized under its own peculiar laws, and that the public schools in the State at large are regulated and controlled by the general laws of the State.

3. That a portion of the funds applicable to the payment of the expenses of the public schools in Mobile county, is required to pass through the public treasury of the State, and are to be paid over to, and be disbursed in Mobile county by the school commissioners thereof.

4. That they are advised and believe, that in strict right and according to the law of the case, they are entitled to call directly for payment to themselves, or through their proper officer, of that portion of money in the State treasury applicable to the payment of the expenses of the public schools of Mobile county; but that N. B. Cloud, superintendent of public instruction for the State, insisted to them that this could only be done through a county superintendent of education for the county of Mobile, and that such an officer was necessary for other purposes in said county, as well as in any other county not having a separate school organization and system of its own, as had the county of Mobile.

5. That although they believed this unnecessary, they yielded to the opinion of said Cloud, as superintendent of public instruction as aforesaid; and about the twentieth of January, 1869, said Cloud appointed one Allen H. Ryland such county superintendent, and that they recognized him as such officer.

6. That under the views of said Cloud, it was necessary that the county superintendent should make to him a report at the close of each quarter, certifying the amount of current school expenses, whereupon, they were led to believe, said Cloud would immediately get the State auditor to draw his warrant on the treasurer in favor of said Ryland, for such current school expenses, upon the school fund in the State treasury belonging to the county of Mobile.

7. That upon this expectation, such reports were made



for the several quarters ending the 31st of December, 1868, the 31st March, 1869, and the 30th of June, 1869, certifying the current school expenses in Mobile county for each quarter ; said report stating the amount of such expenses for each quarter respectively, which they allege were correct. But that said Cloud had absolutely refused to notify the State auditor of said amounts, or to take any steps to procure their payment, or to furnish any warrant for said amounts, or any of them, either to said Ryland or the complainants.

8. That on or after the 30th of June, 1869, said Cloud, without notice, under pretense of authority, and under the pretense that said Ryland had failed to discharge his duty, undertook to suspend him from his office, and to revoke his commission.

9. That one George L. Putnam, of Mobile county, claiming to have been appointed superintendent of education for said county, by said Cloud, about the month of January, 1869, made some sort of a certificate to said Cloud, superintendent of public instruction, and obtained a warrant of the State auditor for the sum of \$5,327 20, or thereabouts, which amount said Putnam obtained from the State Treasurer, Arthur Bingham, under the pretense that it was to be applied to the payment of the current expenses of public schools in said county of Mobile, for the quarter ending the 31st of December, 1868, but they aver said moneys were not applied to the payment of the current expenses of public schools under their charge ; and they further aver, that they are advised and believe, that by the laws of the State, all public schools in said county are required to be under their charge and control ; and that the moneys that come to the county superintendent, should be placed under the charge of the Mobile school commissioners, and that the moneys so obtained by said Putnam, were unlawfully applied to schools not under their control, and a part thereof to his own use, without any warrant of law therefor.

10. That they are informed and believe, that large sums of money are in the State treasury that should be applied to the payment of the public schools in Mobile county for

the quarters before named, for which certificates of said A. H. Ryland, as county superintendent, had been furnished to said Cloud.

11. That said Cloud, under the pretense that said Ryland had been removed, as aforesaid, claims that in August, 1869, said Putnam was appointed county superintendent of Mobile county. But that said Putnam, as they were informed and believe, had not given bond as such alleged superintendent.

That said Putnam, claiming to be such superintendent, had made a certificate to said Cloud, for the sum of \$9,832 23, or thereabouts, for the payment of current school expenses for the quarter ending the 31st of March, 1869, and upon said certificate had obtained from said Cloud, a paper or statement, and had succeeded in procuring from R. M. Reynolds, State auditor, a warrant upon said Bingham, treasurer, for the said sum of \$9,832 23, and was seeking payment from said treasurer.

12. That complainants are informed and believe, that said Cloud and Putnam, are confederating together to prevent the application of said \$9,832 23, to the payment of the present school expenses of the quarters that are already passed, and that said Cloud aided said Putnam in the misapplication of the moneys received by him as aforesaid. That said Cloud and Putnam refuse to recognize complainants as the school commissioners of the county of Mobile, pretending that other persons are the school commissioners of said county, and that they have the power to recognize them as such; whereas, complainants charge, that they are the school commissioners of said county, duly elected and appointed thereto, and have never been removed, or their offices made vacant; that they are so advised by counsel, and believe the same, and that said Ryland, if there is any such office in existence, is county superintendent of said county, under the appointment of said Cloud, superintendent of public instruction, and has not been legally removed from said office; that said Putnam is not superintendent of education of said county, and has no authority to act as such.

That said Putnam, claiming to be such superintendent,

has heretofore drawn moneys from the treasury, which he did not apply according to law, and is seeking to draw other moneys, particularly the said sum of \$9,832 23 called for by said warrant, so obtained by him, &c., as aforesaid, and which they believe and charge he will apply in a manner not warranted by law, unless prevented by the interposition of the court, and that said Cloud is aiding him in said proceedings.

13. Complainants further state, that they are advised and believe, that the moneys in the treasury applicable to the expenses of public schools in said county are properly payable directly to them or to said Ryland, as county superintendent of said county ; but that they are advised and believe, that there is no valid legislation of the board of education, under which any such office as that of county superintendent of education for Mobile county has been created. The reasons alleged are, that when the pretended action of said board under which said Putnam claims to hold said office took place and was had, there was not a majority of the members of said board present, and that said action was had without a quorum of said board.

Complainants state that they have no adequate remedy at law, and pray that said Putnam, said Cloud, superintendent of public instruction, said Reynolds, auditor of public accounts, and said Bingham, treasurer, be made parties defendant, and required to answer said bill of complaint, but not on oath, and that an injunction may be granted and issued to all of said persons, &c., and that on a final hearing the same be made perpetual ; an injunction was therefore issued.

The defendant Putnam filed a full answer on oath, and in vacation moved the chancellor to have the said injunction dissolved, which was done.

Said Putnam, in his answer, denies that complainants, as he is advised and believes, are the school commissioners of Mobile county ; that they were at one time such commissioners, but had been suspended from office by said Cloud, superintendent of public instruction, and that their suspension had been confirmed by the board of education, and their offices declared vacant ; and he appends a copy of



the resolutions of said board to his answer as an exhibit, bearing date the 19th of August, 1869; he also answers that other persons, without naming them, had been appointed in their place.

He denies that the system of public schools for the county of Mobile is a system separate and apart from that of the State at large, in the sense of its not being under the control and management of the board of education of the State.

He admits that said Ryland was appointed superintendent of education of Mobile county by said Cloud, subject to the approval of the board of education; that said board refused to approve of said appointment, and approved of the subsequent revocation of the same by said Cloud; and he appends as an exhibit to his answer a copy of the resolutions of the said board of education on the subject, dated the 19th day of August, 1869; and, therefore, denies that said Ryland is superintendent of education for said county, but avers that he, said Putnam, is such superintendent, and thereto appointed by said Cloud, superintendent of public instruction, on the 6th day of July, 1869; and he states that he appends to his answer as a part thereof, a copy of his appointment as an exhibit; that he gave bond according to law, and entered upon and was discharging the duties of said office, as lawfully he might.

He denies that complainants, or the Mobile school commissioners, whoever they may be, have any legal authority to draw from the State treasury the moneys therein properly belonging to the county of Mobile for the support of free public schools; but says he, said Putnam, county superintendent, is the person, and the only person legally entitled to draw and receive from the State treasury the moneys for that purpose.

He admits that he, as superintendent of education for said county, had drawn the said sum of \$5,327 20, but denies that he had misapplied any part of it. He admits, that by the aid of said Cloud, as superintendent of public instruction, and on his certificate, he had obtained the warrant of said Reynolds, auditor, &c., for the said sum of \$9,832 23 as stated, and that he should have collected the

same, as lawfully he might, if he had not been enjoined from so doing.

He also denies all confederacy, &c.

We think the foregoing syllabus of the bill and answer, sufficient to a proper understanding of what remains to be said in this opinion.

In addition to the questions already disposed of, we now propose to examine those that have a more immediate reference to the propriety of the granting and dissolving of the injunction in this case.

If the complainants are not "the Mobile school commissioners," or if the Mobile school commissioners, whoever they may be, are not as the law now stands, legally entitled to draw from the State treasury the moneys therein properly belonging to the county of Mobile for the support of free public schools in said county; but, if the defendant Putnam, is the superintendent of education for said county, and, as such superintendent, is the person legally authorized to draw and receive said moneys for that purpose, then the injunction was unadvisedly granted, and the chancellor committed no error in its dissolution.

These questions must necessarily be decided and determined by an examination, in connection with the bill and answer, of the XI article of the constitution, and the legislative and other proceedings of the board of education on this subject.

Before entering upon this examination, we will dispose of a preliminary objection made by complainants' counsel in his printed argument, to-wit: that the chancellor proceeded to hear and determine the motion made in vacation to dissolve, and did dissolve the injunction, before the other defendants had answered the complainants' bill of complaint.

This motion was made under section 3438 of the Revised Code, which is in the following words, to-wit: "A defendant may move to dissolve an injunction in vacation before the chancellor of the division in which the bill is filed, either for the want of equity or on the coming in of the answer, to be heard on certified copies of the bill and answer, but ten

days notice of such application must be given to the plaintiff or his solicitors."

We think a fair interpretation of this language will authorize a motion for the dissolution of an injunction, upon a full answer of a single defendant, where there are more than one within whose knowledge the facts charged in the bill must be, if they exist at all.—*Dunlap v. Clements et al.*, 7 Ala. 539.

Chancellor Kent says, "the general rule is, that an injunction, properly granted, is not to be dissolved until the answer of all the defendants has come in. But this rule has exceptions, and is subject to discretion and modification. If both the defendants were implicated in the same charge, I should require the answer of both, without some special reason. If, however, the defendant, on whom the real *gravamen* rested, had fully answered the bill, this would probably be sufficient, and in many cases the injunction will be dissolved, as against the defendants who had answered."—*Depeyster v. Graves et al.*, 2 Johnson's Ch. Rep. 148.

We hold, the discretion here spoken of should be liberally exercised, where, as under our practice, the oath of defendants to the answers is waived.

In this case, the defendant Putnam knows better, or certainly as well, the material facts charged, as either of the other defendants; and besides, he is more deeply interested in the dissolution of this injunction than either of the others. As he had fully answered the bill, he was entitled to have his motion considered without waiting for the answer of the other defendants. Furthermore, if the defendants had answered, as the oath to their answer is waived by the plaintiffs, they most probably would have answered without oath, and then their answer could not be considered; and it would be a great hardship, where the oath of defendants is waived by the plaintiff, not to permit a defendant mainly injured by an injunction granted in such a case, to move for its dissolution on a full answer on oath, denying the equities of the complainants' bill.

There is another sufficient answer to this objection. The record does not show that it was made before the chancellor, and it is too late to make it for the first time in this



court on an appeal. This objection being disposed of, we will now enter upon the examination of the questions having immediate reference to the correctness of the decretal order of the chancellor dissolving the injunction.

Neither the bill nor the answer gives us any information when the complainants were elected or appointed to the office of the Mobile school commissioners—whether under the old or new *regime*.

If they were elected or appointed before the 11th day of August, 1868, then their offices became vacant on that day by virtue of an act of the board of education, entitled “An act to declare all school offices vacant, and to supervise all existing school contracts,” approved August 11th, 1868.—Acts 1868, p. 148.

By the first section of this act, it is declared “that all offices of county superintendents, township trustees, and school commissioners, are hereby declared vacant.” This act clearly embraces “the Mobile school commissioners.”

The board of education, in the passage of this act, followed the example of the general assembly, which, on the 6th of August, 1868, by an act entitled “An act to provide for the qualification of State, county and municipal officers,” declared “that all offices, State, county and municipal, in this State, were, on the 12th of July, 1868, deemed and considered vacant.”—Acts 1868, p. 32.

We are led to infer that the complainants came to their office of Mobile school commissioners after the date of the said act of the 11th of August, 1868. Whether this be so or not, by an act of the said board of education, approved the 5th day of August, 1868, entitled “An act to define the duties of the superintendent of public instruction,” they were, for failing to discharge their duties, or for violating any of the rules or regulations of said board, subject to be suspended from their office by the superintendent of public instruction until their case should be investigated at the next ensuing meeting of said board.—Section 8, Acts 1868, page 154.

The officers directly named in this act are, county superintendents, trustees, school directors, and *other school officers*. The words, “other school officers,” very clearly embraces

school commissioners, and all other school officers, by whatever name known or called, and so they seem to be understood and interpreted by the board of education.

Under the authority of this act, the superintendent of public instruction suspended the complainants from their offices of Mobile school commissioners, on the 30th day of June, 1869; and on the 19th day of August following his action in the premises was approved by the board of education, and their offices declared vacant by a resolution of that date, which is in the words and figures following, to-wit:

“Whereas, the following named persons, acting as a board of school commissioners for Mobile county, to-wit: G. Horton, W. G. Clark, F. G. Bromberg, A. M. Granger, James Baird, J. Carter, R. W. Coale, Charles Mohr, Albert Stein, R. S. Watkins, and A. H. Ryland, having disregarded the instructions of the superintendent of public instruction, and the acts passed by this board, and having violated the free public school laws of this State, and having in various ways failed in the discharge of duty; therefore—

*“Be it resolved,* That the action of the superintendent of public instruction, as set forth in his order dated June the 30th, 1869, suspending the above named school commissioners for Mobile county from office, is hereby approved, and their offices declared vacant. Passed August 19th, 1869.”

On the same day, a similar resolution was passed by the said board of education, in relation to the said Allen H. Ryland, to whose appointment as superintendent of education for Mobile county, the complainants state, they yielded their consent, at the instance of said Cloud, superintendent of public instruction, and recognized him as such officer. Said resolution is as follows, to-wit:

*“Be it resolved by the board of education of the State of Alabama,* That the appointment of A. H. Ryland, as superintendent of education for Mobile county, is not approved, and that we sustain the action of the superintendent of public instruction, in revoking the commission appointing said A. H. Ryland superintendent of education of said county. Passed August 19, 1869.”

The basis upon which the complainants obtained the injunction in this case, is that they were the Mobile school commissioners, and, as such commissioners, were authorized to draw from the treasury of the State the moneys properly belonging to the said county for the support of the public schools thereof, and if they were not, that then the said Ryland, as superintendent of education, was; and that when so drawn, they were entitled to the same, to be applied and disbursed for that purpose.

If there is any vital energy and validity in the said resolutions, the complainants ceased to be the school commissioners, and the said Ryland ceased to be the superintendent of education for said county of Mobile, on the said 19th day of August, 1869, the day said resolutions were passed.

But it is objected by complainants' counsel, that these resolutions are invalid, because there is nothing in the constitution that authorizes the board of education to pass any resolutions *which have the force and effect of law*; and because they not do purport to be approved by the governor.

It is a sufficient answer to these objections, that said resolutions are *administrative, and not legislative acts*, and although valid for the purposes intended, do not claim to be laws in the sense that the legislative acts of said board are laws, and, therefore, the approval of the governor is not necessary. Every person having any considerable knowledge of parliamentary proceedings, knows that it is a common thing in this country for legislative bodies to pass resolutions that have, in no accurate sense, the force of laws, and, therefore, the approval of the governor is not necessary to give them effect. The 16th section, article 5th, of the constitution declares, that "every bill or resolution *having the force of law*, to which the concurrence of both houses of the general assembly may be necessary, except on a question of adjournment, which shall have passed both houses, shall be presented to the governor for his approval," showing that there are resolutions that have not the force of law in the sense in which that word is used in this section. Take, as an example, resolutions requesting



members of congress, and instructing senators to vote in a certain way on some particular measure, before congress. Such resolutions, although commonly in form, joint resolutions, and although it is usual for them to be approved by the governor, yet it is certain they need not be so approved, because they are not laws; for if laws, the senators, at least, would have to obey them, which we know is not always the case.

The 2d section of said article declares that the style of the laws of this State, shall be, "*Be it enacted by the General Assembly of Alabama.*" No resolution, passed by the general assembly, with the approval of the governor, and having the force of law, has this "style." If it had, it would not be a resolution, but an act. In a proceeding to suspend an officer from his office, under the act above referred to, the approval or disapproval of the board of education, is appropriately expressed by resolution, and the approval of such a resolution by the governor, is not necessary to give it effect.

Let us now inquire as to the only remaining question necessary to be disposed of on the present application for a rehearing, to-wit: How, and by whom, money in the treasury of the State, for the use of free public schools, belonging to the county of Mobile, is to be drawn and received.

This question, as it appears to us, is settled by the seventh section, article one, of said act of the 5th of August, 1868.—(Acts 1868, p. 154.) By that section, it is enacted "that the superintendent of public instruction shall certify the apportionment of the school fund income to the State auditor, and shall at once notify each county superintendent, stating the amount apportioned to his county. The county superintendent shall, at the close of each quarter, certify the amount of current school expenses for that quarter, to the superintendent of public instruction, who shall notify the State auditor of said amount, and the State auditor shall immediately draw his warrant on the State treasurer, *in favor of the county superintendent* for such current expenses, upon the school fund in the State treasury belonging to said county.

This section applies to the county of Mobile, as well as to the other counties of the State. The language is general, and there is no proviso excepting any county from its operation.

This construction harmonizes with and is sustained by the following section of the school laws of the board of education. Section one, of article two, of this same act says, "there shall be appointed by the superintendent of public instruction, subject to the approval of the board of education, a person qualified to discharge the duties of superintendent of *education in each county of the State*, who shall hold his office for two years, or until his successor is elected and qualified.

The second section of an act entitled "an act in relation to schools in the city and county of Mobile, approved August 11th, 1868," provides "that there shall be a superintendent appointed for the free public schools of the county of Mobile, to be compensated as the school commissioners may decide, subject to the approval of the superintendent of public instruction, *with the same duties and powers as other county superintendents*.

From these references, we are unable to resist the conclusion that the county superintendent of education for Mobile county, is the only person authorized to draw from the State treasury, and receive the moneys therein, belonging to said county, for the support of the public schools in the same.

It is, however, insisted by complainants' counsel, that these acts of the board of education are unconstitutional and void, because they were passed more than twenty days after the day by law prescribed for the first meeting of the general assembly of this State,—the 13th day of July, 1868,—and article 11, section 9 of the constitution is referred to. This section is as follows, to-wit: "The board of education shall meet annually at the seat of government, at the same time as the general assembly, but no session shall continue longer than twenty days, nor shall more than one session be held in the same year, unless authorized by the governor." By this section, as interpreted by the complainants' counsel, the constitutional term of the

session of the board of education ended after the lapse of twenty current consecutive days, from the said 13th day of July, 1868, including Sundays.

This is a construction altogether too narrow and technical, even admitting that the phrase "at the same time as the general assembly," as here used, is equivalent to saying, "the board of education shall meet *on the same day* appointed for the meeting of the general assembly," which we think it is not.

The constitution manifestly intends to give the board of education at least twenty business days, but it does not require that they shall follow in successive order. We can see no reason why the board may not take a recess during the session, as is often done by the general assembly, without having the days of a recess counted against it.

The constitution is not to be construed like an ordinary statute of limitations.

Furthermore, if necessary to sustain its legislative acts, it should be presumed that the session was continued for a longer period than twenty days, "by authority of the governor."

The governor may unquestionably authorize a session to continue beyond the period of twenty days; unless "authorized by the governor," as used in this section, is an expression adverbial in its character, and intended to qualify both the preceding members of the sentence, without the necessity of a repetition. If the sentence is written out at length, without the illipsis, it will read thus: no session shall continue longer than twenty days, "unless authorized by the governor;" nor shall more than one session be held in the same year, "unless authorized by the governor."

Besides all this, we find these acts of the board of education bound up in the same book with the laws of the general assembly, and published by authority. Mr. Greenleaf, in his first volume on Evidence, § 480, says: "In most, if not all, of the United States, the printed copies of the laws and resolutions of the legislature, published by its authority, are competent evidence, either by statute



or judicial decisions, and it is sufficient *prima facie* that the book purports to have been so printed."—See, also, § 489.

The same presumptions are to be made in favor of the acts of the board of education as are made in favor of the acts of the general assembly. *Prima facie*, therefore, we will presume these acts were passed both by a lawful board and at a lawful session of the board of education. The analogy attempted to be established between courts of limited jurisdiction and the legislative jurisdiction and powers of the board of education, is without foundation. The legislative jurisdiction or power of the board of education, is not limited, but general and full, as to all matters in reference to common schools and the educational institutions of the State; and, consequently, the general acts of said board are not private but public acts, of which the courts will take notice without requiring them to be specially pleaded.

The other objections made to these acts, although not here specially noticed, have been patiently examined, and we are persuaded they are insufficient to authorize us to hold and declare them invalid.

On the motion to dissolve the injunction, the defendant, Putnam, must be held to be the superintendent of education for the county of Mobile. His answer as to this is responsive to the bill. The bill states that he claims to be such superintendent, by the appointment of the superintendent of public instruction, and he answers that he is such and attaches a copy of his appointment to his answer, as an exhibit. Besides, this is a fact within his own knowledge, and he states it as such. The answer is sworn to, and for the purpose of said motion, must be taken to be true.

The foregoing considerations satisfy us that the decision made in this case at the last term is right; it must, therefore, stand as the judgment of the court.

The application for a rehearing is denied, at the costs of the appellants.

## NOBLE &amp; BRO. ET AL. vs. CULLOM &amp; CO. ET AL.

[CONTEST AMONG JUDGMENT CREDITORS OVER APPLICATION OF MONEY MADE UNDER EXECUTION.]

1. *Submission of cause; when will not be set aside.*—After assignment and joinder in error, and the submission of a cause in this court, the revoking of the order of submission is a matter of grace, resting within the discretion of the court. A motion to set aside the order of submission by one of the parties in a cause, will not be granted, when it may work injustice to the other parties.
  2. *Distribution of money collected on fi. fa.; what judgments have a preference.*—On a motion to distribute a sum of money collected by the sheriff on *fi. fa.*, on several judgments, some of which were rendered in a circuit court of this State before the 11th day of January, 1861, and others rendered in the courts of the rebel State government, the judgments of the rebel courts will be postponed in payment to the judgments rendered by the courts of the State before secession.
  3. *Quere.*—Are not judgments of the rebel courts, rendered in this State during the supremacy of the rebellion, mere nullities?—(Per PETERS, J.)
  4. *Persons holding office, after passage of ordinances 3 and 10 of convention of 1861, how regarded.*—All persons holding office in this State, after the overthrow of the rightful government thereof, by the late rebellion, and after the passage of the ordinances Nos. 3 and 10 of the convention of 1861, are to be regarded as persons holding office under the insurrectionary organization, then having military control of the territory of the State.
  5. *Same; judgments of courts of insurrectionary organization, how regarded.* This insurrectionary organization was erected in defiance of the public policy and constitution of the United States, and the judgments of its judicial tribunals are not such as this court, in the absence of legislative enactments, has authority to recognize and enforce, except, perhaps, as the decrees of foreign courts. (Chief-Justice, *arguendo* in *Martin v. Hewitt*.)
  6. *Same; what not made valid by.*—The judgments of the courts of the so-called Confederate government, erected in this State during the supremacy of the late rebellion, were not ratified and made valid by operation of the reconstruction acts of congress.
- [SAFFOLD, J., *dissenting, held*—1. In cases of successful or subdued rebellion, or when one independent nation succumbs to another, the courts of the conquering government, in the absence of positive legislation, are bound to recognize the rights and obligations of the vanquished people between themselves, as prescribed and determined by their local laws and tribunals, except so far as they militate against the laws and institutions of their own country. 2. In a practical sense, the people

and the government of Alabama, before, during, and since the rebellion, are identical. The participators in the rebellion were alone amenable. Their ordinance of secession was simply void. 3. The laws and judicial decisions of the rebel government of Alabama have been expressly validated by the legal State government, except so far as they were in violation of the constitution and laws of the Union, or of the State.]

APPEAL from the Circuit Court of Montgomery.

Tried before R. M. WILLIAMSON, Esq., an attorney of the court, under § 758 of the Revised Code.

This cause grew out of a motion of the sheriff, for the direction of the circuit court as to the application of moneys collected by him, on various executions issued on judgments rendered by the "county court," afterwards "city court," and the circuit court. The various parties interested appeared and contested with each other the right to the moneys collected. The dates of the rendition of these judgments, and the facts upon which the decision is based, will be found therein.

RICE, SEMPLE & GOLDTHWAITE, and CHILTON & THORINGTON, for appellants.

MARTIN & SAYRE, and ELMORE & GUNTER, *contra*.

PETERS, J.—In this suit, a motion is made to set aside the submission of the cause for the consideration and judgment of this court, which seems to have been made at the same term that the transcript was filed.

The grounds of this motion are—that the cause has been irregularly brought into this court; that it has been brought here by consent, and not by appeal in the regular way prescribed by the statute. No doubt that this court may take jurisdiction of the subject-matter of this suit. It appears that the transcript was filed in this court, on the 16th day of June, 1868, and that errors were thereupon regularly assigned in the names of Noble & Brother, and Mary Mastin and William A. Graham, as executors of the last will and testament of Peter B. Mastin, deceased, by Chilton & Thorington, and Rice, Semple & Goldthwaite, their respective attorneys. And at the same term, the appellees, Wil-



liam O. Baldwin, by his attorneys, Martin & Sayre, and Smith Cullom & Co., by Martin & Sayre, their attorneys, joined in the errors thus assigned. And thereupon the cause was submitted on briefs, at the same term, for the judgment of this court. It is also known to the court, that the distinguished practitioners, above named, were, at the time of the assignment and joinder in error, as above shown, attorneys of this court. Under this order of submission, this case came into the hands of the present court, and has been held under advisement until the present term.

The motion to set aside the submission heretofore made in this case, is denied, because it violates the agreement of the parties upon bringing the case into this court, which is filed with the transcript, and it would operate as an injustice and surprise upon the other litigants adversely interested, who relied upon this agreement. The revoking and setting aside of the order of submission is a matter of grace, and not a matter of right, and it rests in the discretion of the court to grant it, or to refuse it. In such a case, the court will never exercise its discretion so as to injure one party, who may have been betrayed by the seeming bad faith of another. Such has been the practice of our predecessors in this tribunal, and we think it sufficiently well sustained by reason and authority.—*Br. Bk. Decatur v. McCullum*, 20 Ala. 270; *Thompson v. Lee*, 28 Ala. 453; 3 Chitty Gen. Pr. 55, 56, marg.

The appellants will pay the costs of this motion, to be equally divided between them; the appellants, Noble & Brother, one-half, and the executors of Peter B. Mastin, deceased, one-half.

This motion having been disposed of, we turn to the principal case. The transcript shows, that the only cause in this court is the controversy from the circuit court of Montgomery county upon the proceedings in that court in the nature of a suit of interpleader between William O. Baldwin as one party, Smith Cullom & Co. as another party, Noble & Brother as another party, and the executors of the last will and testament of Peter B. Mastin, deceased, as another party, to ascertain which of these several par-

ties was entitled to a certain sum of money which had been collected by the sheriff of said county of Montgomery, by sale under certain executions in his hands, which had been issued on certain judgments in favor of the several parties above named, as plaintiffs, against Thomas H. Watts, as defendant; which judgments are each more particularly described below.

The proceedings in the city or county court could not be joined in the same appeal with the proceedings from the circuit court. We can not, therefore, regard these former proceedings, except as evidence offered on the trial in the circuit court. Neither could the judgments on the motions to amend the sheriff's returns be made a part of this appeal. This proceeding only brings up the judgment on the interpleader. The judgments on the motion to amend the several returns on the *fi. fa.* were final and must be separately appealed from; but as evidence they can not be collaterally impeached.—29 Ala. 92; *Creswell et al. v. Comm'rs Court*, 24 Ala. 282; *Davis v. Calhoun*, 24 Ala. 437.

Then, waiving further discussion of these questions, the case narrows itself, in effect, down to the judgment in the interpleader suit, as to the right to share in the distribution of the money made on the sheriff's sale by authority of the *fi. fa.*, as shown in the record. The circuit court gave judgment in the interpleader suit in favor of Baldwin on his motion, and also in favor of Smith Cullom & Co., on their motion against the sheriff, Johnson, who had collected the money in controversy; and refused to give judgment in favor of Noble & Brother, or in favor of the executors of Mastin, or in favor of Isaac O. Robinson, or in favor of the executors of Rose, each of whom claimed distribution of said funds, to them, on their judgments. But it appears, by the agreement of counsel filed with the record, and by the assignment of errors, that only Noble & Brother, and the executors of Mastin, bring the case to this court.

For the purpose of the disposition of the case in this court, it is only necessary to consider the judgments in favor of Baldwin, and also in favor of Smith Cullom & Co., and Noble & Brother, and also Mastin's executors. As Robinson and Rose's executors do not claim here, their

judgments will not be further noticed, except to state, that did they claim, their application would be determined on the same basis that fixes the fate of the claims of Noble & Brother and Mastin's executor, as these all stand upon a similar condition of facts.

The record shows that Baldwin obtained two judgments against Thomas H. Watts, in the circuit court of Montgomery county, in this State, on the 7th day of December, 1860; the one for \$5,047 77, and the other for \$6,057 33; that this latter judgment was paid off before the commencement of these proceedings, except the sum of \$311 05.

It also appears from the record, that Smith Cullom & Co. recovered judgment against said Watts, in said circuit court, on the 8th day of December, 1860, for the sum of \$5,182 59.

On all these judgments executions of *fi. fa.* were regularly issued in favor of the respective plaintiffs therein, on the 24th day of December, 1860, and were delivered to the sheriff of said county, on the same day of their issuance, and so far as is shown by the record, at the same time. These executions were made returnable to the next following term of said circuit court, which should have been held in May, 1861. But before this period of return arrived, the ordinance of secession of this State from the Union was passed on 11th day of January, 1861, and said term of said circuit court was never held, the rebellion then prevailing in this State having suspended the lawful courts of the lawful State government of the State of Alabama. This court remained thus suspended until the rebellion was overthrown, and this State was restored to the rule of the rightful and lawful State government of the State, in legal union with the government of the United States. This period of restoration, this court has intimated, took place on the 25th day of September, 1865; as on that day, has been fixed the time from which the statute of limitations ceased to be suspended by the late war in this State.—*Holmes v. Coleman*, January term, 1870. It will, therefore, be unnecessary to notice anything that may have been done in the rebel courts in these cases, from the 11th day of January, 1861, until the 25th day of Septem-



ber, 1865, if that date has been properly selected and fixed as the precise date of the restoration of the rightful and lawful government of the State of Alabama. But I do not conceive that that point is necessary to be decided in this case. It will therefore be no further mooted in this opinion.

It is also shown by the record, that Noble & Brother recovered two judgments in a tribunal styled in the record the county court of said county of Montgomery, in the State of Alabama, on the 12th day of March, 1861, against the said Thomas H. Watts; the one for \$646 30, and the other for the sum of \$1,229 30, and that executions of *fiery facias* were issued, on each of these judgments, on the 25th day of March, 1861.

The record likewise shows that Peter B. Mastin, who was then living, but has since died, also recovered judgment in said county court aforesaid, on the 8th day of March, 1861, against said Watts and others, for the sum of \$4,766 48, and that execution of *fiery facias* was issued thereon on the 25th day of March, 1861. After the death of said Mastin, said judgment was revived in the names of his executors, said Mary Mastin and said William A. Graham.

If these supposed judgments in favor of said Noble & Brother, and said Peter B. Mastin, are invalid, then this controversy, so far as they are concerned, is at an end. They have nothing to complain of, as they had no legal foundation to support their demand. Without a legal judgment, they had no right.

In the important case of *Chisholm v. Coleman*, 43 Ala. 204, the judgment of this court is based upon the assumption that a judge of one of the insurgent courts of the rebel government, in the State of Alabama, during the late rebellion, was not a legal judge of the legal and rightful government of the State of Alabama, and as such he was not entitled to be paid his salary for services rendered during the rebellion, by the legal and rightful State government of this State. If the judges of the courts of the insurgent government in Alabama, during the late insurrection, were illegal, then, also, the courts of the same government must

be illegal, as there can not be a legal court without a legal judge.—2 Bac. Abr. (Bouv.) 616, 618, 619. But the same disability which clung to the judge adhered to the court also. Both were illegal, and both vicious, because they constituted, in part, one of the departments of a “State government established in hostility to the constitution of the United States.” What is in hostility to the constitution, is unconstitutional, and, therefore, utterly void.—*Texas v. White*, 7 Wall. 700, 732; *Dodge v. Woolsey*, 18 How. 347; *Mauran v. Insurance Co.*, 6 Wall. 1, 13, 14; *Ex parte Milligan*, 4 Wall. 2; Cooley’s Const. Lim. 3, 4; *Marbury v. Madison*, 1 Cr. 137, 180; 2 Dall. 308. But besides this, the legal and rightful sovereign power only can establish legal judicial tribunals. Usurpers and foreign sovereignties have no such power to do this.—*Snell v. Fausatt*, 1 W. C. C. 271; *Glass v. The Betsey*, 3 Dall. 6; *Bibb & Falkner v. Chambers county*, January term, 1870. If the contrary doctrine were true, then it seems to me, that the judgment in *Chisholm v. Coleman*, *supra*, can not be maintained. But it is the law. Again, the statute of limitations could not have been suspended during the existence of the late insurrectionary government in the State, except on the principle that there were no rightful and legal courts, in which suits might be commenced, or that the plaintiff was denied the use of such courts, as were found here. Otherwise, there was no sufficient legal reason for the suspension of the statute. Yet, this court has decided, that this statute was so suspended.—*Holmes v. Coleman*, *supra*. Upon any other principle, this judgment would seem to be an anomaly.—*Hanger v. Abbott*, 6 Wall. 532.

Following in the same train with these adjudications of our own courts, the supreme court of the United States has declared that “the Confederate States” government was not a legal government *de facto*—in effect, that it was, in point of law, an utter nullity; and that it could not give sanction to any rights.—*Hickman v. Betts et al.*, December term, 1869, of United States supreme court; *Shackelford v. Macon*, Pasch. Ann. Const. U. S. p. 41. This was but carrying out the principles by the same court, announced in *Luther v. Borden*, and *Scott v. Jones*, decided before the

rebellion.—7 How. 1; 5 How. 343. The principle which runs through all these adjudications is the same. It is that the irregular State governments in Rhode Island and Michigan, and all the rebel governments were illegal, and the courts of the rightful and legal government have no power to remove this illegality. If done at all, it must be done by the rightful and legal legislative authority. Nothing would seem plainer than this, upon universally admitted principles. In the important and strongly contested case of *Luther v. Borden, supra*, the chief justice, who delivered the reasons for the judgment of the court, makes a very strong expression of opinion, to the effect that an illegal government set up within the United States, is a *void government*, and that all who act under its authority are trespassers or criminals.—7 How. 38, 39. This was also the intimation of Woodbury, J., in the case of *Scott v. Jones, supra*.—5 How. 376, 377, 378. The courts of the rightful and lawful government can only declare what the law is—what is legal and what is illegal. This is their sole duty.—Marshall, C. J., in *Marbury v. Madison*, 1 Cr. 137, 177. They can not mend that which is bad, nor make bad that which is good. This is the part of the law-making authority alone. And in this State only the legislative authority can make law.—Const. Ala. 1867, Art. III, §§ 1, 2; Art. IV., Art VI. When we look for the law that makes the governments of the organizations of the late rebellion lawful, or the courts or legislatures of these governments lawful, where will it be found? Not in any act of the Congress of the United States—not in the judgments of the highest court of the Union; and not in any law or any judgment of any lawful and rightful court of this State. But by all these high authorities the very converse has been declared. And this tribunal is bound, by oath, to carry out this declaration, unless it comes to the conclusion that the reconstruction acts of congress are unconstitutional and void; and that the principle decided in *Texas v. White*, is a solemn mistake.—Const. Ala. 1867, art. 15. But the opinion in the leading case of *Chisholm v. Coleman*, denies to the insurgent government in this State, after secession, the character of a government *de facto*. If



this, along with the admitted illegality of these governments, is maintained, then the whole foundation, upon which the courts and all the departments of these irregular governments rests for legality, is swept away. It seems to me, that this is inevitable, from what has already been decided, both by this court, and in our national court of the highest authority.

The idea that any State governments may be set up within the limits of the State, which are hostile to the constitution of the United States, and which have been established for the purpose of expelling and overturning the authority of the United States, in the State where such irregular State governments are organized, and that their acts and departments may derive validity from the fact that such irregular State organizations are governments *de facto*, and as such entitled to a legal standing in this court without any recognition of the rightful government, either State or federal, is the fruit of a plant that had its root in the theories of the late rebellion. In my humble opinion, it has no sufficient warrant in our form of government or in the constitution of the Union. I, therefore, think that all this court can do in such a case is, sternly to deny it shelter here, as has been done in *Chisholm v. Coleman*, *supra*.

An attempt to overthrow the government of the United States in any portion of its territory by its own citizens, is rebellion and treason, whether it be put on foot by one man or by five millions of men. The numbers engaged in the effort make no difference.—*United States v. Burr*, 1 Burr Tr. 14; *Ib.* 401, 405, 407; *United States v. Fries*, Whar. State Trials, 458; *Ex parte Bollman*, 4 Cr. 75; *United States v. Greiner*, 24 Law Rep. 92. And all the political machinery organized to support and carry on such an attempt is traitorous and illegal. And the courts of the country, whether State or federal, have no power to remove this illegality. If a contract is made to furnish arms or supplies of any kind, to aid in any manner to carry on such an attempt, it is illegal.—*Patton, Gov., v. Gilmer et al.*, 42 Ala. 548; *Ex parte Bibb & Falkner*, January term, 1870; also, 11 Whea. 258; 2 Pet. 526; 12 How. 79. Then, why

is not a government, or a court, which is but a part of such government, which has been organized for the same or a like purpose, and is equally necessary for that end, equally as bad as the contract? If the government is put on the better footing, it seems to me, this is but a distinction in favor of the higher and more fatal act of treason. The principle is the same in each case. The thing, either way, is forbidden by law; and this it is that makes it illegal. What is illegal is void in court, and the court can not help it. Every department of the national and rightful and legal State government has denounced the whole insurrectionary State governments as illegal, without distinction of departments. This illegality must remain until it has been legally and properly removed, by competent legislative authority.

Has this been done by the rightful and legal government? This is the next question to be considered.

No set of men in a State can confer upon themselves, or assume the power to assemble in convention, and make a constitution and form of government for the people of the State. This was tried in Michigan and in Rhode Island, and in both instances the attempt was pronounced to be void. There can be no legal State government set up in a State of the Union, without congressional recognition, either before the act, in giving the authority, or afterwards in ratification of the precedent act. The president of the United States has no authority to confer this power, or to give it validity by his ratification. Under the novel circumstances in which this State found itself at the end of the late rebellion, it required legislation to restore it to its proper and legal relations to the Union. This legislation involved a national interest, in which not only the people of this State were concerned, but the whole people of the Union. The question was one which more or less effected the general welfare of the nation. With such a question, congress alone had the authority to deal. Under organizations claiming to be State governments, a portion of the people of the State had attempted to dis sever the constitutional connection of the State with the Union, but had failed. During the continuance of this attempt, the terms

of most of the officers of the State government, existing at the commencement of the rebellion, had expired, and there had been no re-elections under the rightful and legal government of the State to supply their places ; so that, at the end of the rebellion, there was an interregnum until the rightful and legal government of the State could be restored or reconstructed. The difficulty thus arising could only be obviated by law. Such law congress alone had the authority to enact. The people of the United States constitute one nation, and they did not design to make their national government dependent on the States. Then, when the question for adjustment is national, it belongs to the congress of the Union to adjust it, and not to the States.—*McCulloch v. Maryland*, 4 Whea. 316, 431, 432, *et ubique* ; *Crandall v. Nevada*, 6 Wall. 35 ; 1 Kent, 236, 237 ; *Gilman v. Philadelphia*, 3 Wall. 713 ; *Cooley v. Wardens Port, Phila.* ; *Curtis, J., arguendo*, 12 H. 299, 319.

There can be no doubt, that congress is vested by the constitution with power to preserve the national existence and its territorial integrity, and also to enforce the execution of its own enactments, and sustain the constitution of the Union, as the supreme law of the land, throughout the entire boundaries of the nation. Secession did not interfere with this power ; for secession was a nullity. In the constitution there is an express grant for all these important purposes.—Const. U. S., art. 1, § 8, cl. 18 ; Paschall's Ann. Const. page 138, and cases there cited ; Ord. No. 16 of Conv. 1867 ; Pamph. Acts 1868, page 167 ; 6 Wallace, 14. These are powers without limitations. Then, congress had authority to pass that system of laws commonly called the reconstruction acts ; and these acts are binding on this court. These acts denounce the government attempted to be set up in this State under the provisional government which followed the suppression of the rebellion, as illegal. The congress refused to acknowledge this government as legal. It rejected its senators and representatives from the halls of legislation of the nation. It was repudiated, and another government was ordered to be formed and established in its stead. This was done. The convention, then, of the 12th September, 1865, was an assembly with-



out competent authority to make a constitution for the State, or to legislate for its people. So far, then, as its ordinances for the ratification of certain laws therein named, and certain acts and judgments, and other proceedings therein mentioned are involved, they are nullities; unless the same have been re-enacted or adopted by the present rightful and lawful government of this State.—Rev. Code, p. 53, Ord. No. 5; *ib.* p. 58, Ord. No. 26. The constitution framed by the convention of the 12th September, 1865, was never submitted to any vote of the people, and it was never adopted by them. It was never the constitution of the State. The people alone are the constitution-makers.—6 Wheat. 389, 390.

So far, then, as the judgments in favor of Noble & Bro., and in favor of Peter B. Mastin, which has been revived in the names of his executors, are concerned, they are yet without valid legalization. The present State government, by its convention, and subsequently by its general assembly, has acted upon the question of the validity of these judgments, and these authorities have only ratified them so far as to make the proceedings had in the rebel courts a basis for an application for a new trial.—Acts 1868, page 186; Ordn. No. 39; *ib.* p. 269; Act No. 48; *Ex parte Norton & Shields*, and *Ex parte Bibb*, January term, 1870.

The legislative authority having gone thus far, and no farther, this court, it seems to me, is not permitted to go beyond this limit; because the only law upon this subject ends here, and here the court must stop. The limit fixed by the general assembly is the limit of the court.—*Cohens v. Virginia*, 6 Wheaton, 260, 335. This can not be transcended without a disregard of law. If further remedy is needed, it is not in this tribunal, but in the legislative department of the rightful and legal government of the State, that it is to be found.

Courts of law, at common law, were authorized to protect their own officers, when acting *bona fide* in executing the process of the court, from the risk of double liability of two or more different claimants. And this practice has been adopted in our own system, and sanctioned by our predecessors in this tribunal.—2 Chit. Gen. Pr. 341, and

cases there cited; *Jones v. Hutchinson*, June term, 1868, in manuscript. Then the interpleader suit in the circuit court was proper.

The question attempted to be raised on the judgments on the motions to amend the sheriff's return on the *feri facias* in the court below, can not come up in this case, except as a question of evidence. The judgments on these motions were not appealed from. They were, therefore, final, and they can not be collaterally impeached in this proceeding or upon objection to these judgments on the motions, as evidence. But if this could not be done, the circuit court, in which the motions in these cases were made, so far as the appellees were concerned, had jurisdiction to hear and decide the motions to amend. And it appears that the proofs are amply sufficient to sustain the judgments allowing the amendments.—*Brandon v. Snow et al.*, 2 Stew. 255; Rev. Code, §§ 2808, 2809; 3 Chit. Gen. Pr. 55, 56, marg.; *McArthur v. Carrie*, Adm'r, 32 Ala. 75.

Under this view of the proceedings in the circuit court, which have been brought into this court, the judgment of the court below is affirmed; and the costs will be divided. The said appellants, Noble & Brother, will pay one-half the costs of this cause in this court, and of the proceedings in the court below, necessary and proper to bring the cause into this court, and the said Mary Mastin and William A. Graham, said executors of the last will and testament of said Peter B. Mastin, deceased, will pay the other half of the costs of said cause, to be levied of the goods and chattels of said deceased, in their hands to be administered.

The chief-justice concurs in the result of the above opinion, but for the present he bases his concurrence upon the argument delivered by him in the case of *Martin v. Hewitt*, at the present term.

B. F. SAFFOLD, J., (*dissenting.*)—This cause was a contest between judgment creditors concerning the disposition to be made of a sum of money obtained by the sheriff on a sale of their debtor's property. Some of the judgments were rendered before the date of the ordinance of

secession, and others were obtained afterwards. It is immaterial for me to inquire into the minute incidents affecting the superiority of the claims of the respective contestants. The decision of this court was placed entirely upon the ground that judgments rendered during the attempted secession of the State from the Federal Union, must be postponed to those of anterior date. They were treated by Justice Peters, in his opinion, as mere nullities, and by the chief-justice, as foreign judgments, constituting mere causes of action, impeachable for irregularity or undue obtainment. From these enunciations of legal principles I dissent, for many, and, in my opinion, cogent reasons.

It has been now nearly ten years since the commencement of events evolving misfortunes which have penetrated into every household, and demoralized our entire population. The point of greatest depression seems at last to be reached, and our people are beginning to recover from their deep distress, reconciled to what has transpired, and hopeful of repairing their shattered fortunes. During all this past time these judgments have been treated as valid, both by the legislative and judicial departments of the State. The people have contracted in reference to them as such, and the tenure of much property is dependent upon them. To unsettle these titles, and launch anew all those whose interests are inseparably interwoven with them, on a vast sea of litigation, will, I fear, tend to familiarize the people with revolution. It will make them incredulous of any speedy and continuing reign of tranquillity, and desirous of change, though it be for the worse. I should be loth to hold, that there could be any time or place in which human beings might exist without some regulations for the preservation of right, and the restraint and punishment of wrong—some laws and rules of society which would remain obligatory, in their effects, between themselves, at least, even after they had emerged into a more extended theatre, and were living under more propitious auspices. I admit that in case of either successful or subdued rebellion, or where one independent nation has succumbed to another, the victors may enact such changes of domestic policy as their own government will authorize, or humanity will sanc-



tion. This, however, must be done by the legislative power expressly. Otherwise, the courts are bound to recognize the rights and duties of the people between each other, as prescribed and determined by their local laws and judicial decisions, except so far as they militate against the laws and institutions of their own country.

In a practical sense, the people, the territory, the laws, the structure of the courts, the property in great measure, the offices, the government of the State of Alabama, before, during and since the rebellion, are identical. There has been an insurrection of vast proportions; and it has been subdued. The participators in it were alone amenable. Their act of secession was simply void.

The people of the State, during the war, occupied a peculiar and difficult position. If they refused to recognize and to participate in the litigation of the courts, the establishment of the Confederacy would have worked the forfeiture of their rights, through their default. If it failed, and all the acts done under the authority of its State government were to be null and void, serious injury would result to them on account of their recognition. The issue of good or evil was thus presented to them, dependent alone upon the success or failure of the Confederacy, without regard to the purity of their intentions.

If the legislative department of the Federal or State government has defined their status during that time, it is the duty of the courts to conform their decisions to it. Has this been done?

In the first place, the rebellion was one of great proportions, embracing at least one-half the territory and one-third of the population of the Union. It organized and conducted for four years a government complete in all its forms and functions, dealing with the lives, liberties and property of all its people. The United States exercised towards it belligerent rights, in the exchange of prisoners, the establishment of blockades, and the capture and condemnation of prizes in the prize courts. After its suppression, none of its adherents were dealt with criminally, which would have been an imperative duty if it had been merely a popular commotion or seditious obstruction of the laws.

There have been repeated positive expressions of the legislative will concerning these judgments. The Constitutional convention of 1867 established them, by providing for new trials under certain circumstances within a limited time.—Ordinance No. 39. The legislature of 1868 repeatedly recognized them as valid and subsisting judgments; on the 12th of August, by an act authorizing appeals to the supreme court, and proceedings in chancery, for the correction of errors in them, if prosecuted within a specified time; on the 10th of October, by an act extending the time granted by ordinance 39, on proof of meritorious defense, provided the judgment had not been fully paid; on the 29th of July, by an act adopting the Revised Code of 1867, containing section 2832, providing for the issue of an execution on judgments rendered between the 11th day of January, 1861, and the 15th of December, 1865, without a revival. In addition to these instances of express recognition and adoption, there are many others of incidental and implied recognition by allusion to, repeal or amendment of laws affecting them.

The judicial and administrative departments of the government also recognized and executed them throughout, the time of the provisional government established by congress under its immediate supervision and control.

It is objected that no act of legislation can validate the pretended judicial action of a usurper, or of tribunals which had no lawful jurisdiction of the subject-matter or the parties over whom they assumed to exercise judicial authority. The fault of the proposition is in its application.

The supreme court of the United States has characterized the government established in the insurgent States as a government of paramount force, to which the United States conceded the rights and obligations of belligerents, regarding its territory as that of an enemy, and holding its citizens, in many respects, for enemies. The same high tribunal has said that it made obedience to its authority in civil and local matters, not only a necessity, but a duty, without which civil order was impossible.—*Thorington v. Smith*, 8 Wall. 1.

The chief-justice, in *Martin v. Hewitt* (present term) holding these judgments to be foreign, says: "Accurately speaking, they (the insurgent governments) were not foreign governments, nor were the judgments of their courts foreign judgments."

The United States supreme court, in *Texas v. White*, (7 Wall. 700,) says: "Each insurgent State continued to be a State, and a State of the Union, with her obligations as a member of the Union, and of every citizen of the State, as a citizen of the United States, remaining perfect and unimpaired." "Acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid, if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

Against these legislative sanctions, judicial interpretations, and undeniable deductions from facts, are we permitted to treat these judgments otherwise than as valid domestic judgments? Ought we to do so, if at liberty? The law is not a Procrustean bed by which human affairs must be measured, nor does it furnish a water of jealousy, ascertaining truth beyond doubt. Like the Sabbath, it was made for man, and not man for it.

NOTE BY REPORTER.—At a subsequent day of the term, Messrs. CHILTON & THORINGTON applied for a rehearing, and filed the following argument in support thereof.

We are free to admit that this court will take judicial notice of the ordinance of secession, and of the war, and after hostilities commenced and were recognized by the government of the United States, and the Southern States



declared in rebellion, and non-intercourse laws passed, we concede that every one domiciled in the Confederate territory must be regarded for the time as an enemy of the United States government; but the ordinance of secession had no such effect. That was a mere *brutum fulmen*. It was the *action* which followed it—the *forcible resistance* to the authority of the government, culminating in a public war, which fixed the status of the Confederate States, and suspended the operation of the constitution and laws of the United States, not *de jure*, but simply because of the impracticability of their enforcement. Suppose, for illustration, that one hundred or one thousand people should assemble now in Alabama, and declare that the ties which bind Alabama to the Union are henceforth severed, and that the State is an independent republic. What of it? Would this affect the status of the State as respects her relation to the Union? Certainly not! Such a proceeding might be never so foolish or so wicked, but *in law* it would affect nothing. Just so, the ordinance of secession of 11th January, 1861, *abstractedly* considered, amounted to nothing. It was a void act, and as such could not change the status of the State, nor deprive any citizen of that protection which the constitution and laws of his country confer upon him. Now, when our judgments were rendered there had been no act of hostility, no rebellion *then* existed, no *force* applied, but simply *paper declarations* of independence of the United States government. It was not until the middle of April, 1861, that the *first force* was used in the capture of Fort Sumter. Suppose the day before this first attempt at actual hostility, the whole scheme for setting up an independent government had been abandoned, could it be said that the judgments of a State court were invalid simply because of the act of secession? Would this, or any court have tolerated the argument, that the proclamation of a self-constituted body of men in the State, striving to withdraw from the parent government, should have the effect of placing the loyal citizens beyond the pale of protection under that government?

We then insist upon our right to the fruit of our judg-

ment into which our contract has been merged, and which the decision of the court strikes down, thus destroying the obligatory force of the contract, and our vested right under the constitution of the United States. We submit that our right to the fruits of our judgment is secured by the fundamental law of the Union, which was over us as a shield when the judgment was rendered, and the money in controversy was levied under it.—See *Bronson v. Kinzie*, 1 How. 511; *McCracken v. Haywood*, 2 How. 608; *Gautty v. Ewing*, 3 How. 707; *Howard v. Bugbee*, 24 How. 461; *Rue v. Decker*, 3 McLean, 575; *Stockwell v. Kemp*, 4 McLean, 85; *United States v. Conway*, Hemp. Rep. 313; *Moore v. Fowler*, Hemp. Rep. 536.

The obligation of the contract, or the judgment into which it is merged, may as readily be destroyed by acting on the remedy as upon the contract. It is the remedy, the right to recover and have satisfaction, that gives to any executory contract its binding force and obligation.

Did Alabama ever cease to be a State in the Federal Union? If so, at what point of time, and by what act or acts? We say, she made an attempt to withdraw, but her attempt was abortive, and she has *in legal contemplation* never been out of the Union. The court, in the opinion in this case, declares secession a nullity, and being void, no such tremendous consequences as putting the State out of the Union could result from this void act. If resistance and force put her out, she certainly remained in until such force was used; but we have shown that no such force was resorted to until long after our judgments were rendered. So that it results that our judgments rendered in March, 1861, are valid, even though we were to admit that judgments rendered *flagrante bello*, were void.

The case of *Chisholm v. Coleman*, 43 Ala. 204, is cited, as furnishing a correct exposition of the law, and according to that case this case must be decided for us, for in that case the court decreed pay to Judge Coleman from the 31st of March, 1862, up to the 16th of May of that year, when he joined the army as colonel of one of the regiments of the Confederate States. The court say that they can not *know* that he did not remain loyal up to the latter period.

This shows clearly that the court, *in the absence of all proof* to sustain the assumption, will not intend that a sworn officer of the law, a judge of one of our courts, without being impelled by some irresistible force, would, in disregard of his oath of office, commit, what this court denounces as treason against the government of the United States, by making his court an adjunct to the rebellion, and thus assisting in overthrowing the power which brought his court into being, and conferred upon him the honor of presiding over it. We invoke the maxim on which courts uniformly act, "*omnia presumuntur rite esse acta.*" As, then, the court rendering our judgments, and the judge who presided over it, might have been loyal, as nothing is shown to the contrary, they must be presumed to have been loyal, and the judgments must be presumed to have been properly rendered.

3. We insist, that these judgments have been validated by virtue of authority conferred by the act of congress known as the reconstruction act, passed 2d March, 1867. The third section provides, among other things, "that it shall be the duty of each officer, assigned as aforesaid, to protect all persons in their rights of person and property," &c.; and by the last section (§ 6) it is provided, "that until the people of said rebel states shall be admitted by law to representation in the congress of the United States, any civil government that may exist therein shall be deemed provisional only," &c. Now, the provisional government that did exist therein, both by its convention and laws, declared these judgments, and the several acts of the legislature not passed in aid of the war, nor opposed to the constitution of the United States, valid and binding.—See ordinance 28th September, 1865, Code, pp. 58, 59; Act adopting the Code, February 19, 1867; Preface to Rev. Code, page 4; Revised Code, §§ 2832, 2825, 2827.

The Revised Code was not only adopted by the provisional government, but was also adopted by the present State government, on the 29th day of July, 1868.

The ordinance of 1865, validating judgments rendered during the war, forms a part of this Revised Code; besides this, various provisions of said Code treat such judgments



as valid beyond all question. Section 2419 of the Revised Code requires that, if no execution be sued out upon a judgment within one year from its rendition, a *scire facias* shall issue *quare executionem non* before an execution can issue, but inasmuch as the unsettled condition of the country during the war might have prevented parties from enforcing their judgments, by the issue of an execution within the year, section 2832 of the Code provides as follows: "In all cases where judgments have been rendered in any of the courts in this State since the 11th day of January, in the year 1861, and prior to the 15th day of December, in the year 1865, on which no execution has issued, execution may issue without a revival of such judgments, but no lien of any judgment or execution existing at the last mentioned day shall in any manner be affected by the provisions of this section." Again, in section 2825, Revised Code, the validity of judgments rendered during the war, on contracts made between the 1st day of May, 1865, (which was the period in which Confederate money was in circulation) might be tested by being vacated and set aside on motion of defendants, upon proof made, before the courts in which such judgments were rendered, that the defendants were by any means deprived of such defense as they would have been entitled to under the provisions of an ordinance entitled, "An ordinance to ratify certain acts, judgments," &c. Again, in section 2827, it is provided as follows: "The parties against whom judgments or decrees were rendered in courts of record, after the 11th day of January, 1867, are, upon application within one year after the approval of this law, on the 11th of February, 1867, entitled to a new trial, upon affidavit showing that the failure to make defense to the suits, in which such judgments or decrees were rendered, was not owing to any fault on their part, and that they had no attorney present in court when such judgments or decrees were rendered; provided, that the court shall be satisfied from all the facts that may be submitted by affidavits of both parties, that a good and meritorious defense exists either in whole or part. This section applies to plaintiffs as well as defendants."

By ordinance of the convention of December 6th, 1867,

(see ordinance 39,) judgments rendered since January, 1861, are expressly recognized as valid, and new trials are allowed to be had upon such judgments, provided the courts shall be satisfied from all the facts that a good and meritorious defense exists, and provided the application is made within twelve months from the date of the ordinance; and by an act of the legislature of this State, approved October 10th, 1868, this ordinance, (No. 39,) was re-enacted, and the time for applying for new trials extended until the 20th June, 1869, provided the court should be satisfied upon the hearing of the application that a good and meritorious defense existed.—See Acts 1868, pp. 186, 187; and for the act extending said ordinance, see *ib.* 269.

The same legislature fully recognized the validity of those judgments, even though rendered by default, by the attempt to declare certain of them void, and to repeal the lien given to them by sections 2867, and 2877 of the Code, but this act has been declared unconstitutional and void. *Weaver et al. v. Lapsley*, 43 Ala. 224.

Thus, we find that our judgments, if we concede they were rendered during the war, and were void for that reason, have been recognized and validated by both the provisional and present State conventions and legislatures, in almost every conceivable form. We submit, whether a judgment rendered in March, 1861, even though no execution had been issued upon it before, may not be enforced by execution, and this without *scire facias* to revive it. If the court decide that execution can not issue upon it, then your honors annul section 2832 of the Code which declares that such execution may issue. This section of the Code is not opposed to the laws or constitution of the United States, and was not made in aid of the war; it is, therefore, a legitimate portion of the Code, as provided by the law of 1867, above quoted, adopting it, and the act of 1868, which continues it in force. We insist that the court has no power to go behind the Code to ascertain from what source its provisions have been derived; they may have been copied from the ordinances of the convention of 1865; from the acts of the legislature during the war, or of the provisional legislature since the war; they may have been

taken from the statutes of New York, as many of them were, or from other States; the simple question is, have they been adopted as a part of the Code of laws of the State of Alabama, and are they in accord with the constitution and laws of the United States and of the State of Alabama? These questions being decided in the affirmative, we submit, that it is the duty of the court to uphold and administer them; otherwise, the court exercises legislative powers, which is prohibited to it by the constitution.

4. We come next to consider whether judgments and legislative acts simply affecting private rights rendered and enacted by the State under her Confederate organization, but wholly disconnected from the war, and not opposed, in themselves considered, to the constitution and laws of the United States, or the State of Alabama, shall be held invalid by reason of their having been rendered, or enacted, by the judiciary or legislature of the rebel government.

The great effort of all civilized governments is to assuage, as far as possible, the horrors and evil consequences resulting from war. This is demanded by the instincts of a common humanity, and the punctilious observance of this principle has marked the progress of civilization and christianity of modern times. The judgment which the court has rendered in this case, in its results, will work out a train of evils upon the people of this State which can scarcely be computed; such a decision, therefore, should have for its predicate the clearest and most indubitable, as well as the most inexorable rules of law and logic. It affects alike the loyal and the disloyal; those who were active in getting up the rebellion, and those who were forced involuntarily to take part in it, or persistently refused to countenance it.

We think we have shown that the rules of law do not justify, much less require, such a decision, and we now propose to fortify our position by citing some of the authorities in the supreme court of the United States, and of eminent publicists and writers on the law of nations. In *Thorington v Smyth & Hartley*, (8 Wall. p. 1,) the supreme court of the United States clearly defines the character of the Confederate government. It was a government of paramount force, and like Castine, while in the British posses-



sion in the war of 1812, or Tampico, while in our possession during the Mexican war, it was supreme in its authority and control while it existed. "It made," (says the court,) "obedience to its authority in civil and local matters, not only a necessity but a duty." In the case of *White v. The State of Texas*, (7 Wallace, 700,) it is said that, "considered as transactions under the constitution, the ordinance of secession adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The State did not cease to be a State, nor her citizens to be citizens of the Union."—See 7th head-note, pp. 700, 701. And in the 16th head-note, page 702, it is said, "that acts necessary to peace and good order among the citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded, in general, as lawful when proceeding from an actual though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

All the judges of the supreme court, except Justice Grier, were agreed upon the merits of said cause; and he went further than any of the judges, in holding that the act of the government of Texas, during the war, in disposing of her United States bonds, although for war purposes, was valid and binding on the State.—See p. 739. If this decision of *Texas v. White* is to be maintained as the law, and the remedy given by the rebel States for the securing of private rights resulting in a judgment, is to be upheld as though the judgment had been obtained in the court of the State of Alabama while a member of the Union, then this controversy is ended and our judgments must be held valid. Why should not this court so hold?

The supreme court thus holds, in the absence of all recognition of the validity of such acts by the loyal State government, what this court, as we have shown, are fully authorized to decide by the ordinances and statutes of the loyal State.

The people of the State must need have some law and some mode of administering and enforcing it, even during a rebellion. They can not live, and ought not to be required to live, in a state of anarchy. Upon principles of pure christian humanity, no christian sovereign would require of subjects, even in a state of rebellion against him, thus to live.—3 Phill. Int. Law, pp. 718, 719; Lawrence's Wheat. on Int. Law, 536; *Foster's Crown Cases*, 188; Gro. on War and Peace, book 1, ch. 4, § 15; Halleck on International Law, 792.

PETERS, J.—The appellants make an application, in this case, for a rehearing. This application is based mainly on the grounds that the validity of the judgments rendered after the 11th day of January, 1861, in the judicial tribunals sitting in this State, were not necessarily void; that this was not a question of law, but a question of proof, which the court could not judicially know; and that such judgments have been made good by the effect of the reconstruction acts of the congress of the United States, passed over the president's veto in 1867.

The former of these questions is so fully discussed in the opinion delivered in this cause upon the hearing in chief, that the repetition of the argument on this application is deemed needless.

It is true, that errors not insisted on in the court below, generally, will not be considered for the first time on appeal to this court.—42 Ala. 108; 9 Ala. 19; 17 Ala. 696. But this court, in seeking reasons for its judgments, is not bound to confine itself to the reasons upon which the inferior tribunal acted. If the court below decided rightly, but gave a wrong reason for its judgment, this court is under no obligation to pursue a line of argument, or to restate the reasons of the court below.

The courts of a State make a part of the government of

a State.—Const. Ala. 1868, art. 3, § 1. And if the government of the State is overthrown, the judicial tribunals are overthrown with it. This court takes judicial notice of the legal government of the State, and as a part of this government, it also takes notice of the legal courts of this legal government. It takes notice also of the jurisdiction and the incidents, which, by law, belong to these courts. It must, then, necessarily take notice of their changes, suspensions or suppressions, or when they cease to exist. These positive and negative facts are alike the subjects of judicial cognizance without proof.—1 Greenl. Ev., chapter 2, §§ 4, 6.

It is too patent to allow of any serious controversy, that there was a suspension, if not a suppression of the rightful legal government of the State of Alabama during the late rebellion. And it is equally well known that, in this State, the rebellion anticipated the passage of the ordinance of secession, on the 11th day of January, 1861. The public arms deposited in the arsenal at Mount Vernon, in this State, were seized by authority of the government having control of Alabama just before that event. This deposit consisted of about 17,000 muskets and rifles, besides other military stores. And Forts Gaines and Morgan were also captured before secession, or immediately after it, by order of the same authority; and the nucleus of a volunteer army of soldiers was formed to resist, with force and arms, the laws and jurisdiction of the United States.—Annual Cycl. 1861, p. 123; Gov. Moore's message to the "Gentlemen of the House of Representatives," of the first rebel legislature held in this State after secession, January 14th, 1861; Ordinance No. 10, Convention January 7th, 1861; *The United States v. Andrew B. Moore*, U. S. District Court, Montgomery, Alabama, No. 1080, in manuscript. And after mentioning the purchase of canon, large quantities of lead, and "one million and five hundred thousand caps," the governor (Moore) in his message above referred to, goes on to say: "The convention," (*i. e.* of Jan. 7th, 1861,) "on the — — inst., authorized me to dispatch troops from this State to aid the State of Florida in taking possession of the forts at the mouth of Pensacola harbor. Accord-



ingly, on the — inst., I ordered three hundred men from Mobile by water, and dispatched five companies, under command of Col. Lomax, by rail from this place, to proceed to Pensacola.”—Journal Called Session Senate of Alabama, January 14th, 1861, p. 12. These troops proceeded to Florida under this order, and accomplished a part of the purpose of their mission. And before this, and as early as the 8th day of January, 1861, commissioners were appointed by the same government, then discharging its functions in this State, to each of the slaveholding States of the Union, for the purpose of inducing them to break up the government of the United States, in conformity with the military operations above mentioned.—Journal of Convention, January 7th, 1861, pp. 16, 17. Moreover, all the officers of this State were absolved from the oath to support the constitution of the United States, which they had taken before the act of secession; and they were all continued in office under the new government set up after secession.—Ordinance Convention, January 7th, 1861, Nos. 3 and 10, pp. 8, 16. The former of these ordinances purports to have been passed on the 29th of January, 1861, and the other on the 23d day of the same month.

Hence, then, it follows that after these acts of open and defiant rebellion, and after the passage of the ordinance last above mentioned, all persons who continued to discharge the function of any office, whether judicial or otherwise, in this State, did so as officers of the insurgent organization, which was then, and until the failure of the insurrection continued to be, the only government exercising authority in this State. This government was set up, sustained, and carried on in defiance of the authority of the constitution of the United States, and in open and intended violation of its provisions.—Pamphlet Acts, Called Session, January 14th, 1862, *passim*. Such a government was, therefore, unconstitutional and utterly void, in all its departments. All the acts of a void government are necessarily void. *Ex nihilo nihil fit*. That which is utterly void can not be ratified. It is of no effect and absolutely null, and can not be made good, for there is nothing to make good.—2 Burr Law Dict. 601, *vox void*.

This court must take judicial notice that the legal government of the State of Alabama, and its legal courts had been wholly and utterly overturned by the rebellion, before the date of the judgments in favor of Noble & Brother, and in favor of Mastin, were rendered—that is, before the 8th and 12th days of March, 1861; and that the government then existing and in power in this State, was unconstitutional and void.—*Texas v. White*, 7 Wall. 700. This being so, these judgments were not judgments of a court that can be noticed, or its decrees enforced in this tribunal. If this be admitted—and I do not see how it can be rationally denied—then the argument of the eminent counsel for the appellants falls to the ground.—*Luther v. Borden*, 7 How. 1; *Scott v. Jones*, 5 How. 343.

The government here relied on by the appellants, is not like that established in New Mexico, under which the case of *Leitensdorfer v. Houghton*, arose.—20 How. 1761. The government in New Mexico was not void or voidable; it was set up under “the authority of the United States.” The Confederate States government in Alabama was erected in opposition and hostility to the national authority, and for the purpose of its destruction. There is, then, no analogy between these cases. The one was established by legal authority, but the other by an authority wholly illegal and void.—*Mauran v. Insurance Company*, 6 Wall. 1, 13, 14.

The Confederate States government in this State, from January 11, 1861, until the overthrow of the rebellion, was a mere insurgent organization, which was wholly forbidden by law. It could not confer upon itself any legal authority. It was against the public policy and the constitution of the Union; and its acts, in all its departments, are illegal and equally vicious. And this vice can not be removed by the courts. Only the legislative power can do this; and this the rightful legislative authority has refused to do. Then, this court has no law to authorize it to say that these judgments have any validity whatever, except, perhaps, as the decrees of foreign courts.—*Martin v. Hewitt*, June term, 1870, Chief Justice Peck, *arguendo*.

But it is contended by appellants that the judgments of

the courts of the Confederate State government erected in the State of Alabama, during the supremacy of the late rebellion, were rendered valid and effectual in law by the act of the congress of the United States, entitled "An act to provide for the more efficient government of the rebel States," passed over the president's veto, on March 2d, 1867.

It is urged that the third clause of the first section of this enactment has this effect. The clause referred to is in these words: "3. It shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or when, in his judgment, it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority, with the exercise of military authority, under this act, shall be null and void."

The so-called Confederate government, in the State of Alabama, during the late insurrection, was either a legal government or it was an illegal government. If it was legal, it must have been a rightful and constitutional government. Then, the congress of the United States could not overthrow it, or suspend it, or interfere with it, any more than it can to-day interfere with the rightful and constitutional governments of the States of Massachusetts, Pennsylvania, or New York. It would be too palpable an absurdity to pretend that these latter governments could be so interfered with or suspended, or displaced by congress, to need an argument to refute it.—Constitution United States, art. 4, § 4; *Luther v. Borden*, 7 Howard 1; *Scott v. Jones*, 5 Howard, 343; Paschall's Ann. Constitution United States, p. 242, *et seq.*; 3 Howard, 224; 13 Howard, 26.

But it has been declared, both by the congress of the Union, and by the highest judicial authority of the Union, that this insurrectionary government was illegal and void,



because it was wholly unconstitutional.—*Texas v. White*, 7 Wall. 700 ; Acts of Congress, July 18th, 1867, supplemental to the reconstruction acts above quoted, § 1. This act of congress inflicts the vice of illegality upon the “government” of the insurgent organization.

It does not spare one branch of this government, or any branch of it, but it strikes down the whole. Then, the acts of every branch of it are bad. Not because the law itself was obnoxious to the constitution of the Union, for it was not so, but because the government that enacted it was unconstitutional and void, and necessarily had no legal power to enact any valid law. This was the only point decided in the case of *Texas v. White*, 7 Wall. 700, *supra*, except the question of jurisdiction.

Then the reconstruction acts did not give validity to the Texas rebel statute. Neither, then, can it give validity to the Alabama rebel judgments. *Ubi eadum ratio, ibi idem jus*.—Co. Litt. 10, a.

Besides this, it may be well doubted whether congress has any legitimate authority to intermeddle with the judgments of a State court, either to make them good or to make them bad, or to impose upon the legal rightful government of a State, the enforcement of the laws or judgments of a rebel insurgent organization erected in such State, in defiance of the constitution of the Union, and for treasonable purposes.

What effect shall be given to such laws and such judgments, is wholly a domestic affair, and it must be left to the rightful State government, upon its restoration, to deal with them as it pleases.—*Sims' Case*, 7 Cush. Rep. 285 ; 8 Wheat. 1 ; 12 How. 293 ; 8 How. 82, 493 ; 3 How. 720 ; 5 How. 115 ; 10 How. 399 ; How. 522 ; *New York v. Miln*. 11 Pet. 138 ; Gardner's Inst. pp. 30, 31, 32.

The judgments of the rebel courts, in this instance, were not judgments of a constitutional court, and the parties who claim rights under them are not entitled to any constitutional protection. Such courts were foreign affairs.—*Scott v. Jones*, 5 How. 343 ; 19 John. R. 59 ; 4 Hill's R. 160 ; 5 Binn. 355.

All offenders against the law are apt to think themselves

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Lanford, v. Patton, Donegan & Co.

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ill used, if they are punished for their crimes ; and those who commit treason, the most inexcusable of all offenses, especially when committed without cause against the best government on earth, are not more free than others from this weakness. The theory that begs to have these insurrectionary governments sustained, because the insurgent power has broken down in ruin, is fatal to the security of the public peace and to the safety of the people. It should therefore find no shelter or encouragement in the people's courts. The objection to the contrary is, that this overturns the law during the rebellion. This is not so.

It only declares that there was no government to enforce the law during this unhappy period ; and those who complain of such results, complain to denounce their own acts. The presumption that sets these insurrectionary, unlawful and forbidden governments on the basis of legal authority, by reason of their necessity, will change the republic into an empire and a tyranny for a like reason.

It destroys all logical distinction between a government of lawless force and a government founded upon a written constitution, owing its authority to the free consent of the governed ; which is the true and safe American doctrine. Declaration of Independence, Revised Code, part 1 ; Gard. Insts. pp. 56, 57, at top.

The rehearing is denied, with costs.

SAFFOLD, J., dissenting.

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## LANFORD vs. PATTON, DONEGAN & CO.

[ACTION ON PROMISSORY NOTE.]

1. *Partnership, suits by ; what should show.*—In a suit by a partnership, the names of the partners composing the firm should be stated with distinctness.

2. *Same; when judgment by default is error.*—In a suit by a partnership, in the firm name only, neither the christian nor surnames of the persons composing the firm appearing in the record, nor aught else in the proceedings by which an amendment might be made, it is error to render judgment by default.
3. *Section 2811 of Revised Code construed.*—Section 2811 of the Revised Code, which provides that “no judgment can be arrested, annulled or set aside for any matter not previously objected to, if the complaint contain a substantial cause of action,” does not effect a case like this, but applies to cases where the parties appeared in court.

APPEAL from the Circuit Court of Madison.

Tried before Hon. W. L. WHITLOCK.

The facts are stated in the opinion.

D. P. LEWIS, and CABANISS & WARD, for appellant.

— — — — —, *contra*.

B. F. SAFFOLD, J.—The appellees, suing in their firm name only, their christian and surnames nowhere appearing in the proceedings, recovered a judgment by default against the appellant. He, on appeal, objects to the judgment for the omission to set out their names properly.

In suits by a partnership, the rule is, that the names of the parties composing the firm should be stated with certainty.—1 Chit. Pl. 256. The failure to do this in judgment by default, nothing appearing in the proceedings by which an amendment could have been made, is a reversible error. *Reid & Co. v. McLeod*, 20 Ala. 516.

Partners in any business or pursuit may be sued by their common name, but the judgment binds only their joint property.—Rev. Code, § 2538. They can not object to this because their liability is diminished. But there is no warrant in the statute for the proposition, in derogation of the general rule, that a partnership may sue by their common name merely.

The omission to state the individual names of the partners is not cured, after judgment by default, by Rev. Code, § 2811; that “no judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action.” We con-



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Johnson v. Reynolds, Auditor.

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strue this section to apply to cases where the parties were present in court. It would be unjust to allow a party, present and cognizant of errors, which could be corrected on the moment, without injury, to reserve them, by his silence, for appeal, with its attendant cost and delay. But when the defendant, admitting his proper liability, and relying upon the right procedure of the plaintiff and the court, declines to defend, he ought not thus to be precluded.

The judgment is reversed, and the cause remanded.

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### JOHNSON vs. REYNOLDS, AUDITOR.

[APPEAL FROM ORDER REFUSING MANDAMUS.]

1. *Sheriff, fees of; what payable by the State.*—Sheriffs in this State are entitled to be paid by warrant on the State treasurer, all fees in criminal cases, except when they are payable by the county, out of any funds administered by the county, whether these funds are general or special; unless there is a special law to the contrary.
2. *Same; what law governed as to fees of sheriff in Montgomery county up to 17th February, 1868.*—In the case of the sheriff of Montgomery county, there was such a special statute, (Acts, 1865-66, p. 583,) which was in force up to the adoption of the Revised Code, on the 17th day of February, 1868. After that date the payment of his costs was governed by the act of the general assembly, as found in the Revised Code.
3. *Mandamus; when lies.*—A *mandamus* will be allowed to enforce a claim for such fees in favor of a sheriff.

APPEAL from Circuit Court of Montgomery.

Tried before Hon. JAS. Q. SMITH.

The facts are sufficiently stated in the opinion.

THOS. M. ARRINGTON, for appellant.

JOSHUA MORSE, Attorney-General, *contra*.

PETERS, J.—A. H. Johnson, as late sheriff of Montgomery county, in this State, makes application to this court for process of *mandamus* to compel R. M. Reynolds, as auditor of public accounts for the State of Alabama, to audit and adjust the accounts of said Johnson against the State, for “fees in certain State cases, due him as sheriff of Montgomery county, to-wit, in cases wherein the costs were not taxed against the defendant, the prosecutor or the foreman of the grand jury, or if so taxed, where an execution was returned, ‘no property found,’ and which fees were not payable by the county.” This application was first made to the honorable judge of the 2d judicial circuit of this State, and by him denied, and the said Johnson now brings the application to this court by appeal, and renews it here.

The account, which is made an exhibit to the petition for *mandamus*, so far as I can make out from the record, contains 132 cases, decided in the city court of Montgomery, in this State, in which cases the amount of fees claimed is \$913.00; and 110 cases, decided in the circuit court, of the said county of Montgomery, wherein the amount of fees claimed is put down at \$648.00; the two amounts making the sum total of \$1,561.00. The judgments, in which these fees are claimed, were rendered during the years 1866, 1867, and 1868. The memorandum of these cases shows that the services rendered by the sheriff in the cases, which are the basis of his claim, were performed in executing process for arrest of the defendants, the summoning of witnesses, commitment of prisoners to jail, impanneling juries; and taking bonds and recognizances of defendants admitted to bail.

This account, or rather these two accounts, were properly proved as required by law, and the clerks of said city court, and said circuit courts, certify that the statement of fees in each case was correct; and that the cases therein named were “*nol prossed*,” dismissed; the defendant, or defendants therein named, were not convicted, on plea of not guilty, but were discharged, suit abated, or forfeiture set aside, and that in the remaining cases executions were issued against the defendant or defendants therein named,

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and were returned by the sheriff of said county "no property found."

Reynolds, in his answer, admits the facts set out in the application, and that he had refused to audit said account, "because there is no provision of law authorizing the payment of said account to be made, or any part thereof."

In the law fixing "sheriff's fees," is this section: "The fees specified in the preceding section, except where some other provision is made by law, are to be collected and paid in the following manner:

"Fees which accrue against defaulting jurors, witnesses and bail, are to be paid by them respectively, unless excused by the court.

"The fees which accrue on the removal of a convict to the penitentiary, to be proved by affidavit of the sheriff or his deputy, and on production of the warden's receipt for the convict, must be paid by the State treasurer on the warrant of the comptroller of public accounts.

"The fees for services rendered in each criminal case must be taxed against the defendant, on conviction, or may be taxed against the prosecutor or the foreman of the grand jury, under the provisions of section 4106, (566); and if an execution against either of them is returned 'no property,' or if the costs are not taxed against either of them, such costs must be paid by the State, *except when they are payable by the county.*

"The accounts due to sheriffs, which are payable by the State, except for the removal of convicts to the penitentiary, must be proved in open court before the presiding judge of the circuit or city court, and certified by him to be correct; or may be certified by the clerk of the circuit or city court, and sworn to before the judge of probate; and being so certified and proved must be presented to the comptroller of public accounts, accompanied by the affidavit of the sheriff to the effect that the same is correct, and that no part thereof has been paid, and if found correct, must be paid by warrant on the State treasurer."—Rev. Code, § 4043.

This account was properly proved and certified as required by law. The proof was taken before the city and



circuit court clerks in the respective cases tried in these courts, and sworn to before the judge of probate, and accompanied by the affidavit of the sheriff.

The only question then is, are these fees, or any part of them, payable by the county? If they are, then they are not to be paid by the State, as directed in the foregoing section. The language of the statute, making the exception, is very broad. It may be justly construed to mean any and all cases, in which the fees are payable by the county, without regard to the fund out of which such payment is authorized to be made, whether a general or a special fund. Any provision, by which the county is required or made liable to pay these claims, would be sufficient to bring them within the exception.

Then let the inquiry be made whether the county is, in any manner, made liable to pay these claims. The section of the Code having reference to this subject, is in these words: "Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of State witnesses, the county treasurer must pay the fees of officers of court arising from criminal cases in which the defendants have been convicted, and have proved insolvent by the return of executions 'no property found,' and also in cases in which the State enters a *nolle prosequi*."—Rev. Code, § 4438.

The character of the claims here insisted on, except certain fees hereinafter named, is precisely that of the fees mentioned in the section last above quoted. It can not be denied that the sheriff is an "officer of court," and as such entitled to participation in this fund; and these are the only fees he is entitled to, which are not otherwise expressly provided for, with the above intimated exception. How can it be said, then, that it was not the purpose of the law to refer to him? It seems to me very clear that it was the purpose of this law to relieve the State treasury from the payment of certain of these fees, and put their burden upon this special fund, which had been turned over to the county for this, as well as some burdens of a like character. This is the most rational conjecture that seems

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to meet the case. Whether the fund, left to the administration of the county, was a trust fund or not is not deemed material. The county has no individual or private interest in any fund entrusted to its keeping and disbursement. It holds all its funds as trust funds. It is, itself, simply an agency. It is but a trustee in all its functions. And the fees of the sheriff claimed in this case, with the aforesaid exceptions, clearly come within the exception of the statute. They are payable out of a county fund, and, consequently, they are payable by the county.

This exposition is in accord with the construction of these laws and the constant practice under them since their enactment. This, of itself, is one of the best and strongest reasons that may be advanced in its favor. Unless the question is perfectly clear the other way, it is universally held sufficient to carry the doubt against the contrary opinion. *Contemporanea expositio est optima et fortissima in lege.* Broom's Max. 300; 2 Inst. 11; Smith's Com. on Statutes, p. 739, §§ 620, 621, *et seq.*; *Scott v. Sanford*, 19 How. 393, Chief-Justice, *in arguendo*.

There can be no doubt that the sheriff is an officer of court, and as such he is one of the persons entitled to participate in the benefit of the fund collected out of fines and forfeitures, for the payment of just such claims as many of those specified in appellant's account. It would seem to be somewhat hypercritical to declare that such a payment was not a payment by the county. If it is not made by the county, it would be difficult to say by whom it is made. Certainly it is made, or should be made, just as any other payment is made by the county; that is, by the county treasurer. And the fund out of which it would be made is certainly a county fund, and found in the county treasury. Revised Code, § 3763; *Warfield v. The State*, 34 Ala. 261; Rev. Code, §§ 916, 917, 930; *Arrington, Solicitor, v. Van Houton*, January term, 1870.

Again, it is not to be presumed that the general assembly intended to burden the treasury of the State, in a season of great pressure upon the financial resources of the State, with the payment of a class of claims which had been otherwise provided for. Such a reason in a case of

doubt—and this is clearly one of doubt, notwithstanding the very ingenious argument of the eminent counsel for the appellant,—is allowed to be sufficient warrant to overrule the contrary construction.—Smith's Com. on Statutes, p. 593, § 548, *et seq.*

But there is another class of fees mentioned in appellant's account, which are not taxed against the defendant, the prosecutor, or the foreman of the grand jury, as they are shown in the exhibit to the petition for *mandamus*, and which are not included in those claims that are payable out of fines and forfeitures under the section of the Code above quoted.

These are fees in criminal cases in which the defendant has been acquitted on verdict of not guilty, or has been pardoned before conviction, and has not been convicted on a plea of not guilty, (*Michael v. The State*, 40 Ala. 361,) and where the suit has abated by the death of the defendant without a *nolle prosequi*, and where the defendant has been discharged from a conditional judgment on a forfeiture, without costs.—Rev. Code, § 4259. There are in appellant's account fees claimed, in a number of cases, of this latter class. These should have been allowed, unless there is some special statute which forbids this.

I have carefully looked over the account, and find that these fees amount to the sum of three hundred and eighteen dollars and sixty cents, (\$318 60,) leaving out the cases in which the defendants were pardoned, because it was not shown that they were pardoned before conviction and without the payment of costs.—40 Ala. 361, *supra*. For this amount the account should have been audited, and a warrant issued for the same, unless there is some special statute for the county of Montgomery, which otherwise provides.

It appears that there is such a special statute applicable to the county of Montgomery, which in some degree influences the decision in this case. This statute was approved February 20th, 1866, and, omitting the enacting clauses, it is in the following words, to-wit :

Sec. 1. "That hereafter it shall be the duty of the clerks of the circuit and city courts of the county of Montgomery,



to furnish to the sheriff of said county a certified list of the costs due said sheriff in every criminal case which may be disposed of in either of said courts in which the State fails to convict, or in which the party or parties are convicted, shall be legally discharged from imprisonment, and where an execution shall be issued and returned 'no property found,' and which certificate being approved by the presiding judge of said court, shall be a charge on the county treasury of said county, and shall be registered and paid by the county treasurer of said county as other county claims are paid.

Sec. 2. "That all laws and parts of laws contravening the provisions of this act, be and the same are hereby repealed; *Provided*, that this act shall only continue in force while stay laws are existing."—Pamphlet Acts of 1865–66, page 583.

The only "stay law" existing at the time this act was passed was the act entitled "An act to regulate judicial proceedings," approved February 20, 1866. —Pamph. Acts 1865–66, pp. 83–87.

This act was existing up to the adoption of the Revised Code, which occurred on the 17th day of February, 1868. Pamph. Acts 1867; Preface Revised Code, pp. 3, 4, §§ 8, 9; Gov. Patton's Procl. Dec. 19, 1867; Rev. Code, § 10.

Then only such items in the appellant's account as come within the rule of construction above laid down, which bear date later than the adoption of the Revised Code, will be allowed; that is, items which accrued between the 17th day of February, 1868, and the 13th day of July, 1868, when the appellant's office of sheriff was terminated by the inauguration of the present State government of this State.

I have attempted to make a calculation of these items, and find that they amount to the sum of one hundred and nineteen dollars and twenty-five cents. For this amount the auditor will issue his warrant on the treasurer as required by law.

The said Reynolds, as auditor as aforesaid, will pay the costs of this proceeding in this court and the court below, and a *mandamus* is allowed in conformity with appellant's

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application to enforce the payment of said sum of \$119,25 above named, in conformity with the law.

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## LOTT, TAX COLLECTOR, vs. HUBBARD.

ACTION AGAINST TAX COLLECTOR TO RECOVER MONEY PAID UNDER PROTEST FOR TAXES.]

1. *Revised Code ; § 435 of, construed.*—Under § 435 of the Revised Code, all persons residing in this State were liable to pay the tax imposed by said section upon their incomes, *from whatever sources derived*, unless such incomes were derived from the gross receipts, gross commissions, or gross profits of such persons, upon whose gross receipts, commissions, or profits, taxes were assessed under the provisions of § 434 ; and such persons only are embraced within the letter or spirit of the proviso, of said § 435, upon whose gross receipts, commissions, or profits, taxes were assessed under the provisions of § 434.
2. *Income ; what subject to taxation.*—Upon the agreed statement of facts upon which this case was tried, the income of the appellee, derived from the mercantile firm of which he was a member, was “liable to taxation.”
3. *Tax assessor, duty of, on refusal of tax payer to give in income.*—If a tax payer refuse to give in his income to the assessor, it is the duty of the assessor to ascertain its amount from inquiry or otherwise, to the best of his information and judgment. If in discharging this duty, acting in good faith, the assessor fixes the amount of such income at a larger sum than it in fact amounted to, and assessed it at the sum thus ascertained by him, such assessment is legal, notwithstanding the mistake ; and the collection of the tax, so assessed by the tax collector, is also legal.
4. *Tax collector ; liabilities and duties of.*—The tax collector has no authority to alter or change the assessment of taxes delivered to him to be collected ; he can neither increase nor diminish the tax of any individual. It is the duty of the tax collector to collect the taxes of all persons as he found them stated in the assessment, and in doing this he subjects himself to no liability on account of errors in the assessment. The tax collector is bound to presume that the assessment has been corrected by the court of county commissioners, as provided by § 534 of the Revised Code.
5. *Income ; what does not exempt from taxation.*—Income derived from an independent source, is not exempted from the income tax imposed by § 435, because it has been applied to the payment of a debt due for rea

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estate, purchased on a credit, and upon which real estate a tax has been assessed and paid for the same period within which such income accrued.

APPEAL from Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

This was an action brought by the appellee against the appellant to recover money had and received by the defendant, to and for the use of the plaintiff.

The case was tried by the court, without the intervention of a jury, upon the following statement of facts, as an agreed case: "In this case it is agreed that the action is brought to recover the amount of certain taxes, which the plaintiff paid under protest to the defendant, (who then was, and still is, tax collector for Mobile county,) on the 13th of May, 1858; that plaintiff was assessed in March, 1867, on \$10,500 worth of real estate, (among other things, being for the house and premises then, and now, occupied by him as a residence,) and on \$10,000 income; that said tax on real estate was for the year 1867, and on the income from October 1st, 1865, to December 31st, 1866; that plaintiff had purchased said real estate in September, 1865, and had paid the State and county taxes on the same for the year 1866, and that plaintiff had expended the whole of his income, realized between the 1st of October, and the 31st December, 1866, (after paying necessary expenses of living,) in paying the purchase-money for said real estate; and, in short, that he was taxed for the same period on his income, and on the real estate, in the purchase of which he had expended the whole of that income, and that the said assessment on the income was made after June 1st, 1867.

It is further agreed the plaintiff did not give in his income for taxation as above, when his tax list for that year was made up; but declined to do so on the ground that said income was not liable to taxation, and that thereupon the assessor fixed the amount at \$10,000, and the plaintiff applied to the court of county commissioners for relief against said tax on income, which was refused, and that



plaintiff afterwards paid said tax, protesting, nevertheless, that he was not liable therefor, and that said tax on \$10,000 income amounted to \$185.00. It is further agreed that exhibit A, hereto attached, exhibits the true income of plaintiff for the time between October 1st, 1865, and December 31st, 1866, which shows the same to have been \$6,404; and the items claimed as deductions therein [which reduced his taxable income to \$3,935,] were fairly and correctly stated.

Now, if upon the facts herein agreed, the court shall be of the opinion that said income was not liable to taxation, (by virtue of its having been entirely invested in real estate, which was taxed to plaintiff during the period it was earned,) then judgment shall be for the plaintiff for \$185.00, with interest from 13th May, 1868, and costs. But if the court is of opinion that said income was liable to taxation, but that the amount of the same was wrongfully, and without authority, set down by the tax assessor at \$10,000, then the court shall determine what deductions are to be allowed on said true income of \$6,404; and the plaintiff shall have judgment for an amount equal to the State, county, and school tax, on the difference between such reduced income and \$10,000, with interest from May 13th, 1868, and costs. If the court shall be of opinion that said income was liable to taxation, and was legally assessed and collected, then judgment shall be given for the defendant for costs, either party reserving the right of appeal, &c."

The court being of opinion that said income was not liable to taxation, gave judgment for the plaintiff for the amount of taxes on said income collected by the defendant, and to this judgment defendant excepted, and now assigns the same for error.

The cause was argued orally at the bar by Messrs. RAPIER and MCKINSTRY, for appellant, and by Mr. P. HAMILTON, *contra*, who filed a brief of Mr. Croom, for the appellee.

C. W. RAPIER, for appellant.—The income of the defendant from the 1st of October, 1865, to 31st December, 1866,

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was assessed in conformity with sections 479 and 480 of the Revised Code. No question, however, is made on this point.

The investment of defendant's income in real estate on which he paid taxes for the current year, did not exempt him from the income tax. The statute gave no exemption for such cause. Income and land are distinct subjects of taxation.—See § 435, and subdiv. 2 of § 434 of Rev. Code.

The proviso in section 435 exempts only so much of the income of the tax payer as is composed of gross receipts, commissions, or profits on which taxes are assessed under the preceding section. Subdivisions 6, 7 and 12, of section 434, determine what income was exempt from the operation of section 435.

Revenue acts are not penal acts, and, therefore, are not to be construed strictly; nor are they acts in favor of private rights, and, therefore, to be construed liberally. They are to be construed according to the true import and meaning of their terms. They are not to be strained to reach cases not within their terms, nor to exclude cases clearly within them.—Smith's Com. on Stat. and Const. Construction, 71½; *Adams v. Bancroft*, 3 Sumner, 387.

The construction contended for by defendant's counsel would defeat the plain intent of the law, and greatly impair the income tax. According to such construction, if the tax payer should hoard or lend out his income, or invest it in a steamboat, the income, as such, would not be subjected to a tax, because in such case it would be taxed in the steamboat or as hoarded or lent money.

By the constitution of 1865, there was no limit to the taxing power of the State, except as to taxes on lands. The tax in question was imposed when that constitution was in force. It could in no sense be regarded as a tax upon land. There could, then, be no constitutional objection to it.

S. CROOM, for appellee.—The income had been previously converted into real property for homestead.

The question is, was appellee liable to pay this double

tax on the same value. It arises on the revenue act as found in the Revised Code.

Paragraph 2 of section 434 of the Revised Code levies a tax of three-tenths of one per cent. on real estate. Section 435 levies a tax of one per cent. on the annual gains, profits or income of every person residing in the State; *provided*, that any person shall be exempted from the operation of this section, upon whose gross receipts, commissions or profits, taxes are assessed under the provisions of the foregoing section.

The question, on the facts, is, is the appellee, who has paid tax on the real estate, liable to pay tax on his income which had been converted into this real estate?

1. Revenue laws are a burthen, and though not to be construed as penal laws, yet their burthens are not to be lightly extended.—3 Sumner, 387; Sedgw. Stat. 334.

2. It is certainly a principle of natural equity and justice, that a double taxation should not be exacted of the citizens.—See Acts 1859-60, p. 6.

3. The construction that will support the claim of the collector of taxes, would violate that principle. It is not claimed that double taxation is void, but that it will not be favored, and will not be exacted, unless it can not be avoided.

4. In this case, the act itself seeks to avoid this injustice, by the proviso attached to section 435.

5. It is contended that this case falls within that proviso. This income or profits of the year had been changed from money, which generally represents income, and had become real estate; though changed in form, it still represented the annual profit or income, and in its new form had paid the appropriate tax. The party had the right to make the change, and this does not affect the question.—1 Sumner, 159, 165.

Nothing can be argued against the right claimed, because the rate of tax on land is less than on income or profit. Such discriminations are constantly made in rates of taxation, and for reasons of which the taxing power is the rightful judge.—1 Sumner, *supra*.

If necessary to consider the matter, very good reasons



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may be suggested why real estate should be taxed at the lowest rate, and below the tax on income and profits. A very good reason would be found in the desire to encourage immigration, and the investment of capital in permanent property.

6. The words of exemption used in the proviso to section 435 clearly cover this.

Wherever the gross receipts, the commissions or the profits of any person are taxed under section 434, they are excluded under section 435. The language is not, that the exemption shall be allowed only where the same property, which was income, has been taxed *under the name* of gross receipts, commissions, &c., under the previous section, but shall be exempt where taxes have in fact been assessed on the same property, without reference to name or form.

It is submitted, the judgment of the court below is clearly right.

PECK, C. J.—This case originated in the circuit court of the county of Mobile.

In that court the appellee was plaintiff, and the appellant defendant.

The action was brought to recover money had and received by defendant, to and for the use of the plaintiff.

The cause was tried by the court, upon certain facts stated and agreed upon by the parties, without the intervention of a jury.

Upon the facts stated, as an agreed case, judgment was rendered for the plaintiff, and thereupon, the defendant excepted to the ruling and decision of the court.

The case stated, and agreed on, by the parties, is set at length in the record.

On the case, thus made up by the parties, they agreed, that if the court should be of opinion that plaintiff's income, therein stated, was not liable to taxation, (by reason of its having been entirely invested in real estate, which was taxed to plaintiff during the period it was earned,) then judgment should be entered for the plaintiff for one hundred and eighty-five dollars, with interest from May 13th, 1868, and costs.

But if the court should be of the opinion that said income was "liable to taxation," but that the amount of the same was wrongfully and without authority set down by the tax assessor at ten thousand dollars, then the court should determine what deductions were to be allowed on said true income of \$6,404, and the plaintiff should have judgment for an amount equal to the State, county and school tax, on the difference between such reduced income and \$10,000, with interest from May 13th, 1868, and costs. But if the court should be of the opinion that said income was liable to taxation, and was legally issued and collected, then judgment should be given for the defendant, with costs.

The real estate referred to in said agreement was a house and premises occupied by plaintiff as a residence, estimated to be worth \$10,500, and was taxed as real estate, under Part 2 of § 434 of the Revised Code.

This real estate was purchased by plaintiff, in September, 1865. This property was purchased partly, or wholly, upon a credit, and upon it he had paid the State and county taxes for the year 1866.

The income of plaintiff, upon which he was assessed, and upon which the tax was paid, under protest, accrued between the 1st day of October 1865, and the 31st day of December, 1866. This income was not realized from the said real estate, but grew out of the business of the firm of Hubbard & Tardy, of which the plaintiff was a member, between the said 1st day of October, 1865, and the 31st day of December, 1866.

This income the plaintiff did not give in to the assessor in writing, or otherwise, as an item upon which he was liable to be taxed, but refused to do so, upon the ground, as he insisted, that said income was not liable to be taxed, because he had applied it in payment of said real estate, so purchased by him as aforesaid. Thereupon, the assessor, under section 479 of said Code, after the 1st day of June, 1867, ascertained, from inquiry or otherwise, the amount of said income, to the best of his information and judgment, and assessed the same on the amount so ascertained by him. It is not claimed that the assessor did not act in

good faith, in determining the amount of plaintiff's income. If it was set down at too large a sum, he has no one to blame for it but himself.

We hold, it was his duty, on the request of the assessor, to give in his income, and this he might have done, under protest, if he and the assessor disagreed as to its liability to be taxed, and by so doing, he would neither have lost nor waived any right or remedy he might have had in the premises. He should have known if he refused to give it in, the assessor, if an honest and faithful officer, would ascertain the amount as best he could, in the way the law required, and in doing so, if he fixed the amount at too large a sum, he would have to submit to it, and, moreover, be subject to be assessed a double tax on the same.

In such a case, we are not aware of any remedy to correct a mistake honestly made on the part of the assessor.

The plain letter of the law makes it the duty of the assessor to ascertain the amount, and, as a punishment, assess the delinquent a double tax.—Section 479 of Code.

The plaintiff's income, so ascertained and assessed, was entered in the assessment book required to be made out by the assessor and delivered to the probate judge, as provided by section 473 of the Code.

This assessment book was afterwards examined, by the court of county commissioners, as provided by section 534 of said Code, and then delivered to the defendant, the tax collector of said county, as his warrant and authority to collect the taxes assessed and set down in said assessment book. As tax collector, he had no authority to alter or change the same, or to increase or diminish the tax of any individual therein named, but it was his plain duty to collect the taxes, as he found them therein stated, and for doing this he subjected himself to no liability to the plaintiff, or to any other person. But, as he has agreed, that if the plaintiff's said income was not liable to be taxed, for the reason in said agreement stated, to-wit, because the plaintiff had invested the same in real estate, upon which he was taxed between the periods within which the said income accrued, then judgment should be entered against him, &c., as aforesaid; therefore, he must abide by his



agreement, whether it was by him advisedly or unadvisedly made.

The question thus arises, was the plaintiff's income, for the time stated, exempted from taxation for the reason mentioned in said agreement?

We have carefully examined and considered this question, and we feel constrained to decide, that neither the reason given, nor any other reason we are able to discover, exempted said income from taxation.

The said real estate, as property, was taxed under part 2 of section 434 of the Revised Code, three-tenths of one per cent. *ad valorem*.

This section gives the subjects and rates of assessment as to property and persons. It provides, that taxes must be assessed by the assessor, in each county, on and from the following subjects, and at the rates following, to-wit: This section is then divided into sixteen parts, in which the persons and the several items, &c., subject to taxation, and the different rates at which they are to be assessed, are specified and stated. These items embrace almost every species and kind of property, including moneys hoarded, or kept on deposit, loaned, or employed in certain business, and on the *gross receipts, gross commissions, and gross profits* of certain named occupations and employments. The rates of taxation, it is seen, vary from one-tenth of one per cent. to three per cent.

On some items the tax is an *ad-valorem* tax, on others it is a special tax, and on all the several occupations and employments named, the tax is assessed on the *gross receipts, commissions and profits*. This fact should be noted, as it will be necessary to refer to it in considering what persons are embraced in the proviso to section 435, which is the section that provides for the assessment of *incomes and salaries, &c.*

It is not a question for the courts to determine, whether the great diversities in the rates of taxation, or the modes and manner of their assessment, or the exemptions from taxation, are wise or unwise, just or unjust. These are matters exclusively for the consideration of the legislature.

The following section (435) of the said Code, is a part of the same act with the said section 434, and cannot be well understood, especially the proviso thereof, without reference to the latter named section.

The said section 435 declares, that there must be assessed and collected, upon the annual gains, profits or incomes, of every person residing within the State, *from whatever sources derived, &c.*, over five hundred dollars, at the rate of one per cent. In estimating these gains, profits or incomes, certain specified deductions are to be made. Then follows a proviso to this section, in these words, to-wit:

*"Provided, That any person shall be exempted from the operations of this section, upon whose gross receipts, commissions or profits, taxes are assessed under the provisions of the preceding section."*

The language of this proviso is plain and unambiguous, and, when considered in connection with said section 434, there seems to us no real difficulties in determining what particular persons are entitled to its benefits. It clearly only embraces those persons upon whose *gross receipts, commissions or profits, taxes are assessed under the provisions of the previous section 434.*

Now, who are those persons? It is only necessary to refer to the several parts of said section 434 to answer this question. Thus we shall see, that persons *engaged in certain occupations and employments*, are, in the language of said proviso, assessed upon their gross receipts, commissions and profits. For example, commission merchants are assessed upon their gross commissions; persons engaged in cotton pickeries, the storage of cotton, other merchandise or property; persons employed in running railroads, and all petroleum and oil companies, or distillers of coal oil, are assessed upon the gross receipts of their several occupations and employments; and so, too, all banking associations, erected under the laws of the United States, are assessed upon their gross profits. Here we have persons, some assessed upon their gross commissions, some assessed upon their gross receipts, and some assessed upon their gross profits.

Such persons, therefore, are embraced within both the letter and spirit of said proviso, and entitled to the benefits of it. But the plaintiff is, clearly, not embraced or included within either of these classes or categories, and, consequently, is excluded by the letter of the proviso; and, we are unable to see how he can, with any propriety, be held to be within its spirit and meaning. He has been assessed and taxed upon the estimated market value in money of the said real estate, mentioned in the case agreed, but he has not been assessed upon the *gross receipts, incomes or profits*, derived from the same.

The plaintiff's income, upon which the tax was assessed, did not, nor did any part of it, grow out of this real estate, but it was wholly derived from the profits of the said firm of Hubbard and Tardy.

Can a person, who has realized an income, (immaterial how,) or from whatever sources it may have been made or derived, escape or exempt himself from paying a tax upon it, by the way or manner in which it is used, applied or disposed of? Clearly, this proviso does not say so. It is insisted, however, that plaintiff, inasmuch as he applied his income in paying a debt contracted in the purchase of real estate, upon which he had paid taxes, should be held to be within the spirit and meaning of said proviso, otherwise he would have to pay a double tax. We confess we are unable to see it in that light. He was, undoubtedly, liable to pay a tax on his real estate, under part two, of said section 434, and it was immaterial whether he had paid for it or was still indebted for the same; and by said section 435, he was just as liable to pay a tax upon his income, *from whatever sources derived*, even if it had been derived from the said real estate itself, unless exempted from doing so by the proviso to said section, which, we are clearly of the opinion, he was not.

It may safely be said, that the payment of an income tax, almost necessarily involves in some indirect and limited sense, the payment of a double tax; for income, oftener than otherwise, in some way, either directly or indirectly, is derived from, or grows out of property subject to taxation. The planter pays a tax on his plantation as



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Lott, Tax Collector, v. Hubbard.

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property ; he also pays a tax on the income derived from the cultivation of the same ; the owners of cotton presses and pickeries, pay a tax on them as property ; they also pay a tax on the receipts growing out of their employment ; so, too, the owner of a steamboat, or other vessel, pays a tax on such boat or vessel, and he is, also, liable to pay a tax on the profits earned by its navigation. These are all of them, cases and examples, in a limited and secondary sense, of double taxation ; yet, it has never been held to be a reasonable or legal objection to their being so levied and collected.

It may be said to be almost impossible to enact an effective revenue law where income is one of the items of taxation, that just such, and like objections, may not be made to it, and we see but one way to avoid them, and, that is, to abolish taxes on incomes altogether. We decide, therefore, that the plaintiff's income in this case, was, in the words of the case agreed, "liable to taxation," and, consequently, the court erred in entering judgment for the plaintiff.

We also decide, that, as the plaintiff refused to give in his income to the assessor, and, thereby, made it necessary for the assessor to ascertain its amount, from inquiry or otherwise, to the best of his information and judgment ; if, in discharging this duty, acting in good faith, he fixed the amount of plaintiff's income at a sum larger than it was in fact, and assessed the same at the sum so ascertained, the assessment was, notwithstanding, legal. The collection of the tax, so assessed, was also legal ; consequently, the plaintiff is not entitled to recover in this action the difference between the amount of the tax so assessed and collected, and the sum he would have been assessed on his true income, if he had given it in to the assessor, as, we hold, he should have done.

Let the judgment of the court below be reversed and remanded, with instructions to the court below to render judgment for the appellant, in conformity with this opinion. The appellee will pay the costs of this court and of the court below.

WATTS ET AL. *vs.* WOMACK.

[ATTACHMENT—AMENDMENT TO AFFIDAVIT.]

1. *Affidavit; definition of.*—An affidavit is an oath in writing, sworn to before an officer authorized to administer it, and it may or may not be subscribed by the party making it.
2. *Same; when sufficient to authorize issuance of an attachment.*—Such affidavit, though not subscribed by the party making it, is sufficient to authorize the issuance of an attachment, under the act of October 10th, 1868, and of December 28th, 1868, for the protection of laborers, and to enforce liens in their favor.
3. *Same; when may be amended.*—Such an affidavit, when otherwise perfect, may by leave of court be amended, by permitting the party who made it to subscribe his name to it in open court, after the return of the attachment into court, although the judge of the court is not the officer or judge before whom it was originally sworn to. In such a case the signature is a matter of form, rather than of substance.

APPEAL from the Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

The facts are sufficiently stated in the opinion,

H. A. HERBERT, for appellant,

CRENSHAW & MINNIS, *contra*,

PETERS, J.—In this case an attachment was issued by the judge of probate of Butler county, and made returnable into the circuit court of said county, in 1869. This attachment was issued under the provisions of the act of general assembly of this State, entitled “An act for the protection of agricultural laborers,” approved December 28th, 1868, and the act entitled “An act to give force and effect to liens in favor of agricultural laborers,” approved October 10th, 1863.—Pamphlet Acts, 1868, pp. 252, 455. The only objection taken to the proceedings in the court below, is that the affidavit for the issuance of the attachment was not subscribed by the party making it, or by any one else for him. In every other respect the affidavit

seems to be regular ; but it is not subscribed at all by the party making it. It is simply the plaintiff's oath reduced to writing without his subscription of his name to it. There was a motion to quash the attachment for this omission, which was overruled by the circuit court. Then there was a plea in abatement interposed to abate the attachment, for the same objection. This plea was demurred to, and the demurrer was sustained by the court ; and the plaintiff was permitted to amend his affidavit by subscribing it. These rulings of the court were excepted to and reversed in a bill of exceptions ; and the case is brought to this court by consent, under the authority of section 3486 of the Revised Code.

The attachment, then, was not issued under the Code. The act, first above named, repeals all laws, and parts of laws, contravening its provisions. By the rule prescribed in the Code, the oath required to be made, before the attachment can be issued, must be "reduced to writing and subscribed by the party" making it. But under the acts of 1868, above cited, the "affidavit" for the issuance of the attachment is neither required to be reduced to writing nor to be subscribed by the party making it, or by any one else for him.

These are highly beneficial statutes ; they have been enacted to protect a highly meritorious class of our fellow citizens ; and they should be construed to accomplish this highly important end. This was certainly the intent of the general assembly. Under the Code, where the rule was more stringent as to forms, and the intent of the legislature less evident, the attachment laws were required to "be liberally construed to advance the manifest intention of the law."—Revised Code, § 2990, 2930. This manifest intention of the law can not be advanced by driving the plaintiff from court, without a hearing and decision on the merits of his case. To do so has always been the opprobrium of "right and justice." It is putting the *form*, which is nothing, above the *substance*, which is all.

The form of the oath required in this case is different from that which was required in *Hall et al. v. Brazleton*, 40 Ala. 406. There the law required the oath to be reduced



to writing, and subscribed by the party making it, and it specified certain requisites in order to make the oath complete. Here the law requires a simple affidavit, and subscription by the party making it is not one of its essential or enumerated ingredients. That case, then, is not an authority to govern this. The word affidavit is a very broad term. It may mean an oath reduced to writing and subscribed by the party making it, or only an oath in writing without such subscription.

The legal definition of the word *affidavit*, is "an oath in writing, sworn before some judge or officer of a court or other person legally authorized to administer it; a sworn statement in writing. To make affidavit to a thing, is to testify to it upon oath in writing."—1 Burrill's Law Dict. 68; *Shelton v. Berry*, 19 Texas Rep. 154; 3 Black. Com. 304, marg.; 1 Bouvier's Law Dict 12 edition, p. 96, § 97.

Again, it can scarcely be doubted, that upon the principles which govern the conclusions of the court in the foregoing authorities, and the purpose and intent of our statutes, the affidavit in this case could have been amended. 1 Tidd's Prac. p. 189, marg.; Revised Code, §§ 2990, 2808, 2809.

The above objection is the only error insisted on by the counsel, in their brief on behalf of appellants. In such case, no others will be noticed.—Shepherd's Digest, p. 565, § 38.

There was no error in the proceedings in the court below. The order and judgment of the circuit court is therefore affirmed, at the costs of appellants. And the circuit court will proceed in the cause in that court in conformity with opinion and according to law.

NOTE BY REPORTER.—This opinion was delivered at the January term, 1870, when appellants filed a petition for a rehearing, which was held under advisement until the present term. Neither the briefs, nor the argument in support of the application for rehearing, came into the Reporter's hands. The following response was made to the petition for rehearing by—

PETERS, J.—This is an application for a rehearing. It is based upon the assumption that the oath required for the issuance of an attachment, which was made on the 30th day of September, 1868, can not be amended.

It is said in the original opinion in this case: "Again, it can scarcely be doubted, that upon the principles which govern the conclusions of the court in the foregoing authorities, and the purpose and intent of our statute, the affidavit in this case could have been amended."—1 Tidd's Pr. p. 189, marg.; *Shelton vs. Berry*, 19 Texas Rep. 154, 3 Blackst. Com. 304, marg. One of the statutes here alluded to is in these words: "The attachment law must be liberally construed, to advance the manifest intent of the law, and the plaintiff, before or during the trial, must be permitted to amend any defect of form in the affidavit, bond or attachment; and no attachment must be dismissed for any defect in or want of a bond, if the plaintiff, his agent or attorney, is willing to give or substitute a new bond."—Rev. Code, § 2990, 2808, 2809.

There are two sections of the Code in which the affidavit required to authorize the issuance of attachment is referred to; these are sections 2930 and 2961. In the former the oath is required to "be reduced to writing and subscribed by the party making it," and in the latter it is only required to be an "affidavit in writing." The latter, therefore, may be completed without the signature of the affiant.—19 Texas R. 154, *supra*; 3 Black. Com. 304; 1 Bur. Law Dict., word *affidavit*. Then, the signature to the affidavit thus required is a matter of form, rather than substance, as the oath would be sufficient without the subscription. It is then amendable.

This best comports with the very liberal construction of statutes of amendments in modern practice. They are in favor of justice, and are to be most largely and generously extended, and never so construed as to defeat the remedy; as would be the case in this instance, if the amendment, here insisted on, was refused.—*Gillett v. Robbins*, 12 Wis. 319; *Stephens v. Frampton*, 29 Mis. 263; *Leshade v. Barth*, 17 Cal. 285; *Swilley v. Low*, 13 La. An. 412; *Thomas v. Horn*, 21 Ga. 177.

The statutes upon attachments, being all upon the same subject, are to be construed as one law. When so construed, the reasoning in the original opinion shows that an affidavit not signed by the affiant would be sufficient. If so, the signature is rather a matter of form than of substance, and may therefore be amended.

The rehearing is denied with costs.

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ALLEY *vs.* ADAMS.

[PETITION TO CHANCERY COURT TO COMPEL A STRANGER, IN POSSESSION OF A MORTGAGED ENGINE AND FIXTURES SOLD UNDER DECREE OF FORECLOSURE, TO DELIVER TO PURCHASER CERTAIN FIXTURES CLAIMED BY STRANGER AS HIS PROPERTY AND NOT BELONGING TO ENGINE.]

1. *Intermingling of goods ; when will change ownership of.*—When goods are intermixed wilfully without mutual consent, the entire property belongs to him whose property was originally invaded, if its distinctive character is thereby destroyed. If, however, the goods can be easily distinguished and separated, no change of ownership takes place.

APPEAL from Chancery Court of Macon.

Heard before Hon. N. W. Cocke.

The facts are sufficiently stated in the opinion.

G. W. GUNN, for appellant.

Neither the docket nor transcript gives the name of counsel for appellee.

B. F. SAFFOLD, J.—William Alley sold to Charles M. Caldwell and others a steam-mill engine, and the fixtures pertaining, and took a mortgage on the property to secure the payment of the purchase-money. Afterwards, on a bill by him against them, the mortgage was foreclosed and the property sold by the register. After the execution of



the mortgage and before the sale, the engine was moved and put on Adams' land. At the sale the appellant became the purchaser. She, not being able to obtain from the appellee, into whose possession the mortgaged property had passed, all the articles claimed by her under the sale, petitioned the court to compel him to surrender them. He, in response to a notice to show cause why the prayer of the petition should not be granted, answered that he was and had been willing to surrender what justly belonged to the appellant, but there were certain specified articles, to-wit, a steam chest, feed pipe, mill rocks and gearing, &c., which had never belonged to the mortgagors, and were not included in the mortgage, but had been purchased by him, since the execution of the mortgage, and attached to the mortgaged machinery, and these were his own property; that they could readily be detached without injury, and were known and easily distinguishable from the other machinery. These facts were sustained by the proof. The chancellor granted the relief asked respecting such portions of the property as were embraced in the mortgage, but refused to require the appellee to deliver the specified articles purchased by him, and taxed the petitioner with the costs. From this judgment she appeals.

It is not claimed by the appellant that the articles she seeks to recover were included in the mortgage. Her proposition is that they were so joined to those which she purchased they could not be severed. They are not fixtures because they are not annexed to the freehold.—Chit. on Contracts, 314. Property in goods and chattels may be obtained by accession, under which is included admixture or confusion of goods.—Kent's Com. vol 2, p. 360. When goods are intermixed willfully without mutual consent, the entire property belongs to him whose property was originally invaded, and its distinctive character destroyed. But if the goods can be easily distinguished and separated, no charge of property takes place.—*Ib.* 364.

In this case the answer of the appellee, and the affidavits in support of it—there was no contradictory evidence whatever—specify distinctly the articles claimed and retained by

the appellee, and state unequivocally that they can be separated from the mortgaged property without injury to it. The decree is affirmed.

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## COX vs. MOBILE & GIRARD RAILROAD CO.

[BILL IN EQUITY TO ENJOIN JUDGMENT AT LAW.]

1. *Bill in chancery, motion to dismiss for want of equity ; allegations of, must be taken as true.*—On a motion to dismiss a bill for want of equity, the allegations, whether in the bill, or of the exhibits, which are a part of the bill, must be taken as absolutely true, unless they contradict each other, or are so made as to impair their own force.
2. *Surety on promissory note ; what releases.*—The extension of the time for the payment of a promissory note, by agreement between the payee and the principal maker of the note, without the consent or ratification of the surety, discharges the surety. The actual payment of \$120 extra interest, as a consideration for such agreement, is sufficient.
3. *Bill for new trial after judgment ; when has equity.*—A bill for new trial after judgment at law, is not without equity, when it alleges and sets out in the bill newly discovered evidence which shows that the complainant was discharged from all liability at the date of the trial at law, but which could not then be made to appear by proof, though it existed, but of which complainant, after using all due diligence, then had no knowledge, or opportunity of knowing, and which was discovered after the trial at law.
4. *Same ; diligence, what sufficient.*—When the bill shows that the complainant used such diligence to discover the new evidence, as was in his power, before the trial at law, and failed, this is sufficient diligence.
5. *Same, admission of facts by demurrer for want of equity ; effect of.*—The admission, by demurrer, to the bill for want of equity, of the truth of facts which show that after the trial at law, the complainant discovered new evidence which completely established his discharge, is an admission of the fact of the discharge. Such admission is not merely cumulative evidence of the existence of the discharge, but is an admission of the fact of the discharge itself.
6. *Promissory note, past due ; now transferee holds.*—The transferee of a promissory note, after it is due, takes it just as the transferor held it.

APPEAL from the Chancery Court of Macon.

Heard before Hon. N. W. COCKE.

This was a bill in equity exhibited by the appellant against the appellee, and sought to enjoin a judgment at law.

In the year 1850, appellant, as a mere surety, signed a note made by one Cleckly to one Lampkin, due January 1st, 1851. Suit was brought on this note, and resulted in a judgment against appellant, at the fall term of Macon circuit court, 1858; on appeal to the supreme court, this judgment was reversed, and a new trial was had, and judgment again rendered against complainant at the fall term, 1866, of the Macon circuit court, and it is this latter judgment which appellant seeks to enjoin, on the ground of newly discovered evidence since the trial at law, &c.

The bill alleges that complainant was only the surety of Cleckly on the note to Lampkin; that Cleckly and Lampkin, without the knowledge or consent of complainant, made an agreement extending the time for the payment of the note, after its maturity for several years, on consideration of extra interest, at  $12\frac{1}{2}$  per cent. per annum, which Cleckly paid Lampkin for the extension; that at the maturity of the note, Cleckly had ample property to pay the same, but afterwards failed and became insolvent, and the note was transferred to appellee; that defendant defended the suits at law on this ground—that he “believed he would necessarily have to rely on Cleckly to establish said transactions between Lampkin and Cleckly, and did not at that time know, and had no reason to believe, that said transactions, extensions, consideration paid, &c., were known to any other person than said Cleckly, although he made diligent inquiry, and for the purposes of making him a competent witness, released him, &c.; that he then had interrogatories propounded to him, where he then resided in Georgia, which said interrogatories said Cleckly answered; but from cause unknown—probably on account of the confused business affairs of Cleckly—he answered in a manner not so clear and full as complainant had a right to expect, from what Cleckly before that time stated to him he would prove on the trial; that a judgment was rendered against complainant in 1858, which, on appeal to the supreme court, was reversed and the cause remanded to the circuit



court; that in the meantime Cleckly had returned to, and was a resident of, Macon county, and complainant had him *subpoenaed* to appear as a witness, but that about two weeks before the trial Cleckly departed this life, so that complainant was deprived of his evidence, and judgment was again rendered against complainant; that at neither of these trials did complainant know that any one else besides Cleckly knew of these payments, indulgences, &c., nor had he any reason so to believe; that since the last trial, feeling himself aggrieved, and that great injustice had been done him, he frequently spoke of the matter among his friends and neighbors, and in this way for the first time learned that there was one among them who knew of the transactions between Lampkin and Cleckly, the indulgence granted, the consideration therefor, &c.; that on account of said indulgence, transactions, &c., complainant was released from all liability on the note, and that judgment against complainant is unjust and wrong."

Attached to the bill, as an exhibit, was an affidavit of W. A. Warsden, which, in substance, stated that he saw Cleckly pay Lampkin one hundred and ten dollars and one hundred and twenty-five dollars, in order to get the extension mentioned, and that the said Cleckly and Lampkin made the agreement and did extend the payment of the note from January 1st, 1851, to January 1st, 1855. The affiant stated in the affidavit how he happened to be present, and what occurred to impress it on his mind, and that Cox's knowledge that affiant knew anything of the transaction was accidental, growing out of a conversation Cox had about the "hardness of his case."

The chancellor, on motion, dismissed the bill for want of equity, on the ground that due diligence had not been shown; citing, on this point, *Lee & Norton v. Bank of Columbus*, 2 Ala. 20; *Taliaferro v. Br. Bank, &c.*, 23 Ala. 755; *French v. Garner et al.*, 7 Porter; *Weaver v. State*, 30 Ala. 53; and secondly, because the discovery of parol cumulative testimony to a fact that was in issue in the trial at law, is not a sufficient ground for granting a new trial, citing *McDougald's Adm'r v. Dougherty*, 39 Ala. 434.

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Cox v. Mobile & Girard Railroad Co.

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WATTS &amp; TROY, for appellant.

STONE, CLOPTON & CLANTON, *contra*.

PETERS, J.—This is an application in chancery, in the nature of a motion for a new trial at law. The bill was dismissed upon demurrer for want of equity. In such a case the allegations of the bill are in lieu of the facts stated in the affidavits in support of a motion for a new trial. On a motion to dismiss for want of equity, the allegations of the bill must be taken as absolutely true, unless they contradict each other, or are so made as to impair their own force. A new trial is granted for the sake of obtaining justice.—2 Tidd Pr. 905, marg. A new trial will be granted in equity in case of newly discovered evidence, for fraud, surprise or the like, where the party has been deprived of the means of defense by circumstances beyond his control.—3 Gra. & Wat. on New Trials, p. 1455; *Doubleday v. Makeplace*, 4 Blackf. 9; *Floyd v. Jayne*, 6 John Ch. 479; 2 Story Eq. 173; *Carrington v. Holabard*, 17 Conn. 539.

Here the newly discovered proof shows that there was a contract between the creditor and the debtor without the consent of the surety, to extend the time of the payment of the note, and that the debtor had actually paid to the creditor one hundred and ten dollars in money on this contract, and that the time of the payment of the note was extended until the first of January, 1855. This note was due in 1851. This payment was made in extra interest. At the time it was made the creditor declared that he did not look to Cox, the security, for the payment of the note, but to the debtor, the principal maker of the note, alone for payment. This agreement undoubtedly discharged the surety to the note.—*Cox v. Mobile & Girard Railroad Company*, 37 Ala. 320. The demurrer to the bill admits these facts to be true.—Mitf. Ch., p. 107, 108. Then the complainant, Cox, the appellant in this suit, was legally discharged from all liability on the note upon which he was sued at the time of the trial at law. Under such circumstances it would be unjust to make him pay the note. This injustice must be committed if the judgment against

him is permitted to stand. This would be unconscientious and inequitable, unless there are other principles of equity which intervene to justify this inequity.

It is a principle of equity jurisprudence, that if a party litigant has a sufficient defense at law, that it must be exerted there with proper diligence, else a court of chancery will not interpose to give relief; for this would be to relieve his negligence and not his misfortune.

Here the bill shows that the testimony set out in the affidavit of Warsden, which clearly establishes the above facts, was wholly unknown to the appellant Cox at the time of the trial at law, and no ordinary diligence could have discovered it; because it was not known by Cox to exist, nor did he have any reason to suspect its existence. It was newly discovered testimony of such a character as would have justified a new trial at law, had it been discovered in time to have made it the basis of an application in the court at law.

Warsden's affidavit is a part of the bill. The demurrer admits the facts stated in the bill. This admits the facts in the affidavit. If these facts are true, then it is also true that Cox was discharged from all liability on the note at the date of the trial. But his defense failed, because he was not able to prove it at the time of the trial. This does not make the affidavit merely cumulative evidence. Such evidence merely strengthens other evidence of a like kind. This may leave the question of discharge still in doubt, and as this doubt has been once submitted to a jury, and they have resolved it against the appellant, the same doubt will not be again submitted in a different forum for a second resolution, under more favorable circumstances than it was heard at first. This would be giving a court of equity the power to review the verdict of a jury, which is not permitted.—*Simpson v. Hart*, 1 John. Ch. 91. The jury say by this verdict that there was no discharge proven before them. Hence it did not exist, so far as their inquiry extended. Here it is admitted that the discharge did exist at the time of the trial at law, but the proof that established it was not then known to the appellant, and no ordinary diligence could then have discovered this proof,



but that it has been since discovered, and as soon as it was discovered, this bill was filed. This takes this case without the rule that a new trial will not be granted on merely cumulative evidence.—*Dougald's Admr. v. Dougherty*, 39 Ala. 409.

This objection is rather technical at best. It has nothing of justice in it. And it is an unhappy use of a technicality when it is resorted to in order to defeat the great end of all litigation—the attainment of “right and justice.”—Const. Ala., 1867, § 15.

If Lampkin discharged the appellant from all liability on the note by the agreement to extend the time of payment and received the consideration, as the bill clearly shows, he had no right to compel the appellant to pay it. His right to do this was utterly gone as soon as this agreement was entered into and the consideration was paid.—37 Ala. 320, *supra*. The railroad company stand in Lampkin's shoes. He could only transfer to them the right that was in himself, and no more. *Nemo plus juris ad alienum transferre potest, quam ipse habet*.—Coke, Litt. 309, b; 2 Kent, 324, marg.

The learned chancellor erred in dismissing the bill for want of equity. His decree is, therefore, reversed, and this cause is remanded for further proceeding in the court below, in conformity with this opinion. The appellee will pay the costs of this appeal.

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### LAWSON vs. MILLER

[DEBT ON PROMISSORY NOTE GIVEN AFTER THE WAR IN RENEWAL OF A NOTE GIVEN FOR LOAN OF CONFEDERATE TREASURY-NOTES IN 1862.]

1. *Confederate treasury-notes; note for loan of, void*.—A promissory note given by one citizen of this State to another, during the late insurrection, and payable in this State for a loan of Confederate treasury-notes, is illegal and void.

Lawson v. Miller.

2. *Same*; A promissory note made in this State, since the suppression of the late rebellion, in renewal of such a note, is also illegal and void, and no action can be maintained thereon. (Ordinance 38, Convention 1867.)

APPEAL from Circuit Court of Hale.

Tried before A. BENNERS, Esq., an attorney of the court, under § 758 of the Revised Code, the presiding judge having been of counsel.

The facts upon which the decision is based will be found in the opinion.

G. M. DUSKIN, for appellant.

W. & J. WEBB, *contra*.—"Illegality of consideration," when relied on as a defense, must be specially plead.—See 1st vol. of Chitty on Plead. (14th ed.) p. 515, 516 and 517, note *h*.

But, if this special plea in this case should be held to have put in issue the legality of the consideration of contracts given and executed for a loan of Confederate currency, we maintain the proposition—"that a loan of Confederate treasury-notes was a good and legal consideration to support a promise to pay," unless it be affirmatively shown, that such loan was obtained for some illegal purpose, (such as to hire a substitute to go in the Confederate army,) made known at the time to the party making the loan.

Wherever the loan was made, as in the case at bar, by one citizen of the State of Alabama to another citizen of the same State in the usual and ordinary transactions of business, and for no illegal object or purpose, at a time when there was no other currency or circulating medium in the State, and when, consequently, the people had to pay and receive payment in that currency or not at all, Confederate money must be held to have been, at such a time, and between such parties, so situated, a good and legal consideration for a promise to pay.

But the appellant will urge that the Confederate government was illegally organized for the purpose of making

war upon the United States, and the treasury-notes of the Confederate States were issued by it to enable it so to make its war upon the government of the United States. Conceding all that to be true, yet it does not follow as a matter of course that every citizen of this and every other Southern State, who, during the war, received and paid out Confederate money, was guilty of an illegal act. Nor does it follow, nor is it true, that a loan of Confederate money is such an illegal consideration, as that it will not support the contract.

*The law does not forbid or condemn that which is a matter of necessity.* What could have been a matter of greater necessity, than for citizens of this State, who had no other currency or medium of exchange for three years, *during that time*, to receive and pay out Confederate money or treasury-notes? For them so to do, was a daily necessity. In the every day transactions of life, it was impossible, during that time, when there was no other money in circulation, to avoid using and receiving this money. And if the loan is not affirmatively shown to have been made for the purpose of aiding the rebellion, or for some other illegal object, its loan could not be illegal, and if the money is shown to be of value, it will and must support the promise to pay.

In no work on the subject of contracts, have I been able to find anything of this kind as one of consideration so illegal as to vitiate the contract based upon it.—See 1st vol. Parsons on Contracts, (last ed.) pp. 456, 459, and Story on Contracts (ed. 1844) p. 87, &c. Where is the law to be found which so declares it to be illegal?

The illegality of the Confederate government, and its issue of these treasury-notes, is *too remote* to affect this contract. None of the parties to this suit are shown to have had any connection with that government or the issuing of these notes. The supreme court of the United States, in the case of *Armstrong v. Toler*, reported in 11th Wheat. Rep. p. 268, in the opinion of the court by C. J. Marshall, he quotes the following language used by the court below, and in his opinion reaffirms it to be a correct exposition of the law, viz; “But if the promise be uncon-



nected with the legal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and the conductor of the illegal act ;” and in the same case that learned judge decides—“*if the illegal act is not the consideration of the contract, and is entirely disconnected from it, the contract is valid, though the occasion for making the contract, arose out of the existence of the illegal act.*”—Curtis U. S. Sup. Ct. Rep. vol. 6th, p. 588. And in the case of *Rawdon v. Toby*, as reported in 11th How. U. S. Sup. Ct. Rep. p. 517; in 18th vol. of Curtis’ Sup. Ct. Rep. p. 695, which was a suit brought to enforce the payment of notes given for the purchase of negroes imported from Africa into Texas in 1835: The plea offered was illegality of the importation of the negroes.

On this point, Justice Grier, delivering the opinion of the court, uses this language, pertinent to the case at bar : “On the argument here it was endeavored to be supported on the ground that the notes were void, because the introduction of African negroes both in Cuba and Texas was contrary to law. But in neither point of view will these facts constitute a defense in the present case. If these notes had been given on a contract to do a thing forbidden by law, undoubtedly they would be void.” But the court adds, that the plaintiff “had no connection with the original illegal act of introducing the negroes contrary to law.” In that same case of *Rawdon v. Toby*, the court goes on to say—“If the defendant should be sued for his tailor’s bill, and come into court with the clothes on his back, and plead that he was not bound to pay for them, because the importer had smuggled the cloth, he would present a case of equal merit and parallel with the present, but would not be likely to have the verdict of the jury or the judgment of the court in his favor.”

The same reasoning urged by Judge Grier with so much force, is applicable to the case of *Miller v. Lawson*, now under discussion. Miller had no more connection with the authorities at Richmond of the Confederate government, or with the illegal act of issuing these treasury-notes, than

did the purchaser of the tailor's suit of clothes with the illegal smuggling of the goods from which it was made.

In addition to the cases cited on the point discussed above, I refer to Story on Conflict of Laws, (2d edition,) §§ 248, 249, 250; and Story on Contracts, § 227, p. 146.

But there are some later cases than those above. I refer to *Phillips v. Hooker*, in which Judge Pearson of North Carolina rendered an able opinion, to be found in the number of the American Law Register for the month of October, 1868.

In the case of *Kepel's Adm'r v. Petersburg R. R. Co.*, (to be found in the January number, 1869, of the American Law Review,) Judge Chase, presiding over the U. S. circuit court, at Richmond, Va., rendered a decree for a dividend declared by the company in Confederate money. It was in a suit instituted by a stockholder in that road, for the recovery of a dividend ascertained and declared during the reign of the Confederate government; declared for so many dollars, and founded upon the excess of the receipts of that road over its disbursements in *Confederate money*.

The opinion of Judge Chase says: "At the time several of the dividends were declared, the chief currency, and when the others were declared, almost the entire currency of that part of the country in which the railroad was operated, was in Confederate notes; and whatever currency of bank notes there may have been in circulation, was of no greater real value. *This currency may fairly be said to have been imposed on the country by irresistible force. There was no other in which the current daily transactions of business could be carried on*, and there could be no other while the rebel government kept control of the rebel States. The necessity for using this currency was almost the same as the necessity to live. No protest, no resistance, could avail anything. At the same time this currency, though it depreciated rapidly, had a sort of value. Its redemption, though improbable, was not impossible, and until the downfall of the Confederacy it had a greater or less degree of purchasing power.

After assigning other and additional arguments, Judge Chase renders a decree for the value of the dividend in the

present legal currency of the United States; a decree which had no other foundation or consideration than the Confederate money received by the railroad.

In the case of *Miller v. Gould*, 38 Georgia Reports, where a contract was made between two citizens of the late Confederate States during the war, on the 12th day of July, 1862, payable three years after date, the consideration of which was Confederate treasury notes, the only circulating currency at that time, and which was recognized as *lawful* by the assumed authority which had the actual possession and control over the territory and people at the time the contract was made,—“*Held*, that although the issuing of such notes by the assumed Confederate authority for the purpose of carrying on a war against the government of the United States, may have been illegal, as against that government and the citizens thereof, who, during the war, were under the actual protection of that government, outside of the lines of the assumed Confederate authority; yet, such a contract made between citizens residing within the lines of the assumed Confederate authority, *in their ordinary business transactions*, between themselves, and having no connection with the prosecution of the war against the United States, *is not an illegal consideration, as between the contracting parties themselves*, they having made the contract under the assumed authority, which was then over them, (whether rightfully or wrongfully assumed, is not now the question.) recognized the currency as legal and valid at the time the contract was made; therefore, as between the contracting parties themselves, the plaintiff below is entitled to recover.”—See *Miller v. Gould*, 38 Ga.

In a recent case decided by Judge Chase, [I regret I have not the full facts and case before me,] the facts were about these: “An insurance company, doing business in New York, had an agency during the war in the city of Richmond, and the agent of the company in Richmond received from a citizen of Richmond, who held a life policy in the company, payment of the annual premiums in Confederate money. The party whose life was insured died, and since the war the widow of the deceased brought suit



on the policy for the recovery of the amount stipulated to be paid. The suit was resisted by the company, on the ground that Confederate money would not support the promise to pay. Judge Chase gave judgment in favor of the holder of the policy.

Neither the civil or criminal law, statutory or common, forbids and pronounces illegal any act or contract *which is a matter of necessity*. In criminal jurisprudence, the law of self-defence, justifying even to the taking of life, is an illustration of this proposition. So in the case of a shipwrecked mariner, cast on shore without bread to sustain life, would be, in any court in the world, held perfectly justifiable in appropriating for that purpose, to his own use, anything which he might seize that would afford nourishment. *Necessitas excusat legem.*"

Judge Chase, in his opinion delivered in the case of *The State of Texas v. White, Childs et al.*, uses an argument drawn from this law of necessity, to pronounce valid even some acts of the government of Texas, during the late war—"acts necessary for peace and good order."

In these States during the period of the late war, when there was no other medium of exchange, of barter and of sale than the Confederate currency, it can not be held for one moment that every citizen of such States, who either received or paid out Confederate money was guilty of an act illegal, and to be illegal it must be pronounced illegal either by statute, or by the principles of common law. It is not, and will not be contended that there is any statute on this subject. Then, to make the receiving and paying out of these notes, and every act of such receiving, &c., to be illegal, the principles of common law must be so plain, and so strong, as to overcome that most potent argument of "*necessity*." Is there any such rule at the common law? Judge Story, in his work on Contracts, says: "A contract may be illegal because it contravenes the principles of common law, or the special requisitions of a statute; the former illegality exists whenever it violates public policy or morality."

The public policy of what! I answer of the State and government under which the parties live, and make the

contract. Whatever might have been the prohibition, arising from public policy, which, during the late war, prohibited a citizen of the State of New York, (then, and now under the government of the United States,) from trading with a citizen of the State of Alabama, in and for these treasury notes, or from making a contract based upon them as a consideration, yet the same rule of prohibition, arising from public policy, does not apply to a contract between two citizens of the State of Alabama, at a time when that State was under the dominion and arbitrary power of the Confederate government. The public policy referred to by Judge Story must be the policy of the "*lex loci contractus*." The public policy of Alabama, at the time of this loan, is illustrated by the acts of the legislature authorizing executors to receive Confederate money.

PETERS, J.—This was an action of debt, founded on a promissory note, in the words and figures following, to-wit :

"\$447 50. Greensboro, Ala., August 1st, 1865. One day after date, I promise to pay W. G. Miller, or bearer, the sum of four hundred and forty-seven dollars and fifty cents, borrowed money, with interest from date. Witness my hand and seal. [Rev. stamps, 25 cents.]

"L. LAWSON."

The suit was instituted by Miller against Lawson, in the circuit court of the county of Hale, in this State, on the 3d day of August, 1867, and was finally tried on the 30th day of March, 1869. The cause was submitted to a jury, who found for the plaintiff, Miller, and assessed his damages at one hundred and eighty dollars and eighty-two cents. For this amount the court rendered a judgment, and for costs. From this judgment Lawson appeals to this court.

From a bill of exceptions taken at the trial, it appears that the note in question in this case, on which the suit was founded, was given in renewal of another promissory note, which had been made between the same parties during the late war of rebellion, for a loan of Confederate treasury-notes. It had no other consideration. It was, then, a transaction to give circulation to what was called

"Confederate money;" that is, the treasury-notes issued by the so-called "Confederate government of America," for the purpose of supplying the means to that organization to pay its expenses and to carry on the war that it had levied against the United States.

This case is different, in principle, from any other case that has yet been before this court, or, so far as I am informed, before any judicial tribunal of a more general jurisdiction in the Union. This is a transaction simply to give circulation, as currency, to Confederate treasury-notes. In other cases, the transaction has grown out of a sale or purchase of valuable legal property, about which the parties had the fullest right to contract, and the controversy has been, so far as I have been able to comprehend it, one in reference to the *medium* of payment,—whether this should be enforced, as the parties had agreed, in Confederate treasury-notes or not. Uniformly, I believe, thus far the decisions have been, that, so far as the stipulation to pay in Confederate treasury-notes was concerned, this has been disregarded, and the payment has been compelled to be made in the legal currency of the nation. The principle that underlies these decisions must be, that the agreement to pay in Confederate treasury-notes was wholly void, and therefore might be disregarded. Otherwise, the party who made such a promise undoubtedly had the right to stand upon it, and pay only as he had agreed to pay. It is the essence of a contract, that a party can only be required to perform what he agreed to do—neither more nor less. And as the promissor received a benefit, which he might lawfully receive, he ought, in good conscience and law, to be compelled to pay the reasonable value of the benefit thus obtained, if he held on to it or enjoyed it.—*Hale v. Houston, Sims & Co.*, January term, 1870; *Kitchell, Adm'r, v. Jackson*, January term, 1870; *Thorington v. Smith*, 8 Wall. 1; *Hitchcock v. Lukens*, 8 Por. 333; *Cobb v. Cowdery*, 40 Vt.; *Gelpecke v. City of Dubuque*, 1 Wall. 175, 206, at bottom.

The Confederate government, so-called, was an illegal and insurrectionary affair. Its design was treasonable against the United States. It levied open war against



them. The currency called Confederate treasury-notes were bills of credit made, issued and circulated to aid and maintain this illegal organization. They were issued for an illegal purpose by an illegal authority, and to support and strengthen, and carry on war levied by citizens of the United States against the government of the United States. This war was actually levied and being vigorously prosecuted when these treasury-notes were made and issued, and they were so made and issued and put in circulation to furnish the means to wage this war. Their issuance and circulation for this purpose was against the public policy of the nation. They were issued for warlike purposes, in aid of a treasonable war against the Union. They were therefore contraband, illegal and utterly void, from the beginning. And all who contributed to circulate them and give them currency as money, but contributed to repeat their issuance, and to participate in giving aid and success to an illegal act. The citizen was bound to know that the the authority that issued these notes was illegal and traitorous, and that they were issued and circulated to give aid and comfort to this illegal authority. Being illegal and traitorous in their origin and design, they could not be the basis of a lawful contract. To affirm such contracts would be to validify and carry out so much of the purposes and policy of the late Confederate rebellion, as they constituted a part of it. It would *pro tanto* have the effect to enforce the orders of *Gen. Van Dorn* and *Gen. Bates*, issued in the time of the late rebellion, for the same end. During the late war their issuance was to aid the war, which was an act of treason; and knowingly to circulate them was a participation in that act. Such paper can not be regarded as legal money, nor the foundation of a legal and valid contract. And the renewal of the note did not take away the illegality of the original transaction.—(*Chase, C. J., in Shortridge v. Macon*, 16th June, 1867; *Paschal's Ann. Const. United States*, p. 211, note 215; 2 *Burr's Trial*, pp. 439, 401, 405, *et passim*; *United States v. Fries*, Whar. St. Tr. 458; *Bollman's Case*, 4 Cr. 75; 1 *Burr's Trial*, 16; *United States v. Greiner*, 24 Law. Rep. 92; *United States v. Pryor*, 3 W. C. C. 234; *United States v. Hodges*, 2 Wh. Cr.

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Cas. 477; *United States v. Michell*, 2 Dall. 348; *United States v. Hanway*, 2 Wall. Jr., C. C. 140; 1 Kent, 137 to 143, and cases cited; *Armstrong v. Toler*, 11 Wheat. 258; *Ocean Ins. Co. v. Polleys*, 13 Pet. 157; *Kennett v. Chambers*, 14 How. 39; *Davidson v. Lanier*, 4 Wall. 447; *Brown v. Tarkington*, 3 Wall. 377; *Nordlinger v. Vaiden*, 2 Am. L. Rep. 188; *Bk. of Tennessee v. Union Bk.*, 2 Am. L. Rep. 346; *Ex parte Milner*, 16 Am. L. Rep. 371; *Avera v. Robertson*, 6 Am. L. Reg. 291, notes; *The Peterhoff*, 5 Wall. 28.

Besides, this is a contract that most clearly comes within the effect of ordinance No. 38 of the convention of 1867. (Pamph. Acts 1868, p. 185, Ord. 38, § 2.) In a case recently adjudicated in the highest court of the nation, the chief-justice declares: "But it must be remembered that the *whole* condition of things in the insurgent States was matter of *fact* rather than matter of law."—(8 Wall. 13.) Then the State, upon its restoration to power, might in its sovereign authority declare what such a state of facts, as is shown in this transaction, should amount to, in its courts. Here the transaction was begun within this State by citizens of this State, to be finished within this State. In such a case it has been well said by a recent able writer, on such subjects, that "each State has, then, by the present weight of authority, the right to determine, *for its own citizens* and *in its own courts*, *what it will*, in respect to a contract which is either made within its sovereignty, *or* to be performed there."—3 Par. Contr. p. 439, and note *w*, 5th ed., 1866. This is simply what has been done by the ordinance above referred to. And it is, so far as it is constitutional, the law of the State.—*Fletcher v. Peck*, 6 Cr. 87; *Mobile & Ohio R. R. Co. v. The State*, 29 Ala. 573.

The contract sued on in this case was then wholly void. The charges asked in the court below, were in conformity with the principles herein laid down, and it was error to refuse them.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

## PRICE WILLIAMS AND SONS vs. McCONNICO ET AL., GUARDIANS.

## [JUDGMENT AGAINST GARNISHEE.]

1. *Error, what can not be raised for first time in this court.*—The citation to the garnishee in an attachment suit, varied erroneously from the attachment and judgment, in describing the plaintiffs as guardians of two persons instead of one of them only,—*Held*, the error, if one, is amendable, and can not be raised for the first time in this court, the parties having failed to do so in the lower court.
2. *Commission merchant; when liable for interest on balance remaining in his hands.*—A commission merchant is liable for interest on a balance in his hands in favor of his principal, in the absence of proof of some contract or usage of trade to the contrary.

APPEAL from the Circuit Court of Conecuh.

The record does not give the name of the presiding judge.

The appellants, who were garnishees on an attachment suit instituted by the appellees, assign errors upon the record in this case, there being no bill of exceptions. The notice of garnishment served on them described the plaintiff in the attachment suit, as guardians of two persons, and the judgment is in favor of them as guardians of one of them only. The judgment entry against the garnishees, recites, that by the answer of garnishees, there was due the defendant in attachment, the sum of \$692 08 on 15th January, 1867, together with the further sum of \$148 79, interest up to date, for which amount judgment was rendered.

The errors assigned are, 1st, that "the process of garnishment was issued in favor of appellees in a different capacity from that in which judgment was rendered in their favor—the appellees being described as guardians of Sallie and Bettie Stallworth, and the judgment is in their favor as guardian of Bettie only." 2d. "That appellants were commission merchants, and as such merely deposit-



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aries, and not liable for interest without default made, on demand of one authorized to receive payment."

MARTIN & SAYRE, for appellants.

S. J. CUMMING, *contra*.

[The briefs in this case did not come into Reporter's hands.]

B. F. SAFFOLD, J.—If the citation to the garnishee, (Revised Code, § 3944), ought to contain an accurate description of the capacity in which the plaintiff sues, the error objected to is amendable, the record being right in every other part, and can not be presented for the first time in this court, after appearance in the court below.—Rev. Code, §§ 2809, 2810, 2811; *Moore & Lyons v. Stainton*, 22 Ala. 831; *Daniel v. Hopper*, 6 Ala. 296; *Smith v. Chapman & Porter*, 365.

Without proof of some contract or usage of trade, that commission merchants are merely depositaries, and not liable for interest until demand made and default, the court can not know that a commission merchant is not chargeable with interest on a balance in his hands in favor of the principal.

The judgment is affirmed.

NOTE BY THE REPORTER.—Afterwards the appellants applied for a rehearing, to which the following response was made—

B. F. SAFFOLD, J.—The appellants failed to show any special reason in the circuit court why they should not be charged with interest. This court is not authorized to reverse or correct the judgment, on an assumption that a commission merchant is not liable to his principal for interest on a balance in his hands. He may or may not be, but that he is not, cannot be shown for the first time on appeal.

The application is denied.

JAMES ET AL. *vs.* JOHNSON, ADM'R.

[ACTION BY ADMINISTRATOR TO RECOVER MONEY OF DECEDENT'S ESTATE  
LOANED BY HIM WITHOUT AN ORDER OF COURT.]

1. *Administrator, loan of money by; when a devastavit.*—No law of this State forbids, in terms, an administrator to lend the money of an estate which he represents. In so doing, he may or may not be guilty of a *devastavit*, according to circumstances.
2. *Administrator, contracts made with; in what capacity may sue on.*—An administrator may sue in his representative capacity, upon a contract made with him in that character, or he may sue in his individual right.
3. *Abstract charge; when not ground for reversal.*—An abstract charge, shown by the record not to have prejudiced the appellant, is no ground for the reversal of a judgment.

APPEAL from the Circuit Court of Bibb.

Tried before Hon. B. L. WHELAN.

The facts are sufficiently stated in the opinion.

JOHN T. HEFLIN, for appellant.—The appellants insist that the court erred in the charge given, and in the three charges refused, all of which involve in substance the same principle. The ground on which error is complained of in these charges, is this—an administrator is not authorized to loan out money which is assets of the estate he represents, without an order of court licensing such loan; if the administrator loans money without such order, the loan is a conversion of the money to his own use, for which the administrator is responsible to the estate, but can not sue on such unauthorized contract in his representative character, and expose the estate to costs in suits on contracts he has no power to make. If the administrator can recover on such loan, it must be in his individual and not in his representative capacity.—*Reynolds v. Tompkins*, 17 Ala. 109.

An administrator can not do a wrongful act, and thereby acquire a right of action that will subject the estate he

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represents to the hazard of costs or damages.—*Gilmer v. Weir*, 8 Ala. 72.

An administrator can not convert the property of the estate, and by the conversion acquire a right of action in his representative capacity, any more than by the sale of property at private sale, he could recover in his representative capacity. The reason of the rule is the same in each case; the loan of money without an order is a conversion which is prohibited by law; the sale made privately is a conversion and prohibited; hence, the administrator can not sue as such, because, in each case, he transcended his powers and acted individually, and can only recover individually, if at all.—*Fambro v. Gantt*, 12 Ala. 298.

J. H. CHAPMAN and WATTS & TROY, *contra*.—The plaintiff was authorized to recover the money loaned, whether loaned with, or without an order of court.

The rule in *Pertole v. Sheet*, 5 Porter, which has been followed by several later cases, only applies to actual conversion of the personal property of the estate. It is respectfully submitted that the reasoning of all these cases is erroneous. Suppose the administrator does an illegal thing in reference to the property of the estate; sells without an order of court. The title of the property thus sold does not pass out of the estate. This illegal act of the person, who may be administrator, can not be said to be done in his *representative* capacity. In his *representative* capacity he *can not* do what the law forbids. As an *individual* he may be *estopped* by being in *pari delicto* with the defendant; but how can it be legally or logically said that *he*, in his *representative* capacity, is in *pari delicto*. How can it be legally, and logically said, that the estate he represents is in *delicto*? He being the legal *representative of the estate*, ought to have the power to recover the *assets* of the estate.

The cases of *Pertole v. Sheet*, *supra*; *Smith's Adm'r v. Snodgrass*, 17 Ala.; *Lay's Adm'r v. Lawson*, 24 Ala.; *Fambro v. Gantt*, were cases where the administrator-in-chief had sold or loaned property, such as negroes, &c., belonging to the estate. It was held that the title to this prop-



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erty, thus illegally sold or loaned, had never passed out of the estate; that the administrator-in-chief could not recover; but that the administrator *de bonis non* could recover! Why? Because the property thus sold or loaned, illegally, was *unadministered*—remaining in specie—and, therefore, the administrator *de bonis non*, had the right to recover it. But money has no ear marks. It is not the identical money loaned, which is here sought to be recovered; and an administrator *de bonis non* could not recover the identical money loaned by the administrator-in-chief. He would only recover for so much money illegally loaned by his predecessor. Now, the administrator *de bonis non*, if he were to sue, must sue on the alleged illegal contract of his predecessor. And, if the administrator-in-chief would be estopped from a recovery on such illegal contract, the administrator *de bonis non* must likewise be estopped; for he would sue on such illegal contract. If the thing illegally loaned was a horse, or a slave, which remained in specie, he might recover it as assets of the estate, remaining *unadministered* by his predecessor. But how can it be said that the money thus loaned remains, unadministered, in specie? But the defendants were estopped from denying the right of the plaintiff to recover; they made the contract with him as administrator, and can not allege the illegality.—See *Grigsby, Ex'r, v. Nance*, 3 Ala. 347; *Harbin v. Levi*, 6 Ala. 399.

The case of *Tompkins v. Reynolds*, 17 Ala., shows that the defendants are bound to pay the money, either to the plaintiff, as an individual, or as an administrator of the estate.

They are estopped from denying his right to recover as administrator.—See *Grigsby v. Nance*, and *Harbin v. Levi*, 6 Ala., *supra*.

B. F. SAFFOLD, J.—The appellee, in his representative capacity as administrator of the estate of Elizabeth Johnson, sued the appellants, as partners, on a promissory note, made by them in his favor as such administrator. The complaint contained, also, a count for money loaned, and one on an account stated. Issue was joined on the pleas of *non assumpsit*, payment and set off. The note was

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excluded as evidence for not being sufficiently stamped, but the evidence sustained the complaint that the money had been borrowed by the defendants of the plaintiff, and that it was assets of the estate of the intestate. There was no evidence to sustain the pleas, except of a partial payment, which was allowed. Judgment was rendered for the plaintiff. The appellant assigns as error—1st. A charge of the court that the loan of the money, without an order of the proper court authorizing him to do so, would not prevent the administrator from recovering, and the refusal to give charges asked by the defendants asserting the contrary proposition. There is no evidence in the record touching the question whether the loan was made under an order of court or not.

No law of this State forbids, in terms, an administrator to lend the money of the estate. His simple and ordinary duties are to collect the assets, pay the debts, and make distribution. Until prohibited by statute, he might sell or otherwise dispose of the personal property. A loan of money is not a sale of property, and it is questionable whether an order of the probate court would afford him any protection in the absence of statute authority conferring such jurisdiction. In making a loan the administrator may, or may not, commit a *devastavit*. If there was no necessity for such a disposition of the money, and it was needed for other legitimate purposes, he would certainly be guilty of waste, and liable to the creditors and distributees of the estate. But the law some times places him in positions, as in case of an estate kept together for a term of years, where it becomes his duty to make some profitable disposition of money accumulated. In such cases he is a *quasi* trustee or guardian, with the rights and liabilities of those fiduciaries.

In *Harbin v. Levi*, 6 Ala. 399, it was held that when a contract is made with an administrator, with reference to the personal assets of his intestate, he is not compelled to sue as administrator for its breach, although he may do so if he will. As the person contracting with him has dealt with him in his representative character, there is no reason why it should be alleged in the pleadings; and, if

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alleged, it will be considered as mere *descriptio personæ*.—See, also, 1 Chit. Pl. p. 20.

It was not necessary for the administrator to allege or prove that he loaned the money under an order of court; therefore, as there was no evidence on the subject, the charges asked were abstract, and properly refused. The abstract charge of the court is no ground for a reversal of the judgment, because the record shows that the appellants were not thereby prejudiced.—Sheph. Dig., Charge of Court, Abstract, p. 459, § 7.

The judgment is affirmed.

## STIKES, ADM'R, vs. SWANSON ET AL.

[APPEAL FROM ORDER OF DISTRIBUTION OF DECEDENT'S ESTATE—SLAVE MARRIAGES.]

1. *Slaves, marriages between, during slavery; legal effect of.*—The marriages of slaves and of freedmen of color with slave women during the existence of slavery in this State, were not illicit connections, but were legal *quasi* marriages, such as the laws allowed and the church approved.
2. *Same; children of, not bastards.*—The children of such marriages were not bastards at common law, and there is no law of this State which made them bastards. Upon the emancipation of the children of such marriages, by the results of the late war, and the elevation of these persons to citizenship of this State, their heritable blood was restored, the impediment of slavery which obstructed it before, being thus removed.
3. *Same; when such children are entitled to inherit the estate of freedman who died in 1860.*—Such children are entitled to inherit the estate of their father, who died a freedman in this State in the year 1860, when his estate remained in the hands of his administrator up to the date of their emancipation, and was then unclaimed by the State.

APPEAL from the Probate Court of Mobile.

Tried before Hon. G. HORTON.

This is an appeal from a decree of the probate court of



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Mobile county, distributing the estate of Cassius Swanson, deceased, who was a freedman of color.

The facts, upon which the court below acted, were agreed upon by the parties litigant. They were briefly these: Cassius Swanson was originally a slave in the State of Florida; he was there emancipated and set free, under the laws of that State, and removed to the city of Mobile in this State, shortly after his emancipation in Florida, and settled at Mobile as a resident inhabitant of this State. After settling there, he died intestate in Mobile county, in this State, leaving considerable estate, consisting of slaves and other property, which seems to have been altogether personal property. Upon Swanson's death, Augustus Stikes became the administrator of his estate in said county of Mobile. Swanson died some time in 1860, and letters of administration on his estate were granted to Stikes on the 13th day of August, 1860. On the 10th day of December, 1868, Stikes made final settlement of his administration of Swanson's estate, when it was found that there remained in his hands, unexpended, the sum of \$556 18 for distribution amongst those persons entitled to the same. This fund was claimed by Martin, Abraham, and William, who were the sons of Cassius Swanson, deceased; but they were children by two mothers; Martin by one mother, and Abraham and William by another. These mothers were both slave women at the birth of these children; the mother of Martin remained a slave till her death, which occurred before 1859. After the death of Martin's mother, who died a slave, Cassius married a second wife, who was also a slave, and by her he had the children Abraham and William. Martin, Abraham and William were all born slaves, but became free by the result of the late war. The mother of Abraham and William was also made free in the same way; it does not appear whether this latter woman is yet living or not. Cassius Swanson always acknowledged and recognized the mothers of his children aforesaid, as his wives, so long as he and they lived. He did not marry the second wife until after the first wife was dead; and he was a slave himself when he was married to each. He treated and acknowledged

both these women as his wives while he lived. It does not appear that the second wife of said Cassius Swanson had any notice of the proceedings in the court below, or that she was in any manner made a party to the same.

Upon this State of facts the honorable judge of probate of Mobile county, decreed an equal distribution of the funds in the hands of the administrator, Stikes, to the three sons of Cassius Swanson, deceased, to-wit: the said Martin, the said Abraham, and the said William, in share and share alike, and decreed the same to be paid over to each of them accordingly, by said administrator.

From this decree the administrator appeals to this court, and assigns the action of the court below for error.

BOYLES & OVERALL, for appellant.

B. LABUZAN, *contra*.

PETERS, J., (after stating the facts above).—The cohabitation of Cassius Swanson with each of his two wives, was undoubtedly a *quasi* marriage. He did all that he could do to make it legal. The impediment which prevented its legality was the slavery of the parties. This was an impediment not known at common law, and could not exist at common law, because it was not permitted by that code of jurisprudence. The cohabitation was not adulterous; it was permitted, if not encouraged by the laws of all the States where such connections existed. It was then certainly a legal *quasi* marriage. The parties had done all within their power to make these marriages complete and legal. Slavery out of the way, they would have been legal at common law. Certainly the parties intended to marry, and did all that they were able to do to carry this intention into effect; they were then legal slave marriages.—Cobb on Slavery, p. 231, § 253; *The State v. Samuel*, 2 Dev. & Batt. 171; *The State v. Ben*, 1 Hawks, 434; *Chamberlain v. Harvey*, *Ld. Raym.* 146, S. C., *Carth.* 397; *Smith v. Gould*, *Ld. Raym.* 1274; *Forbes v. Cochrane*, 2 Barn. & C. 448; 2 Kent 86, 87, and notes; 2 *Ib.* 246, 247, *et seq.*; 1 Bla. Com. 423; 1 Bish. M. & Div. p. 2, *et seq.*; 6 Bac. Abr. Bouv., p. 454; 2 Pars. on Contr., p. 60 *et seq.*

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Marriage is undoubtedly a natural right, and slavery did not deprive the man in this condition of all his natural rights. So far as was consistent with his *status*, these were allowed. In the distribution of slaves by administrators, the marital rights of the slave, as far as possible, were respected. They were usually allotted by families. They were usually sold when this could be done, in the same manner. The slave might to a certain extent defend himself. These were not mere regulations of humanity; they were permitted in some instances to be enforced as law. Infidelity between the married parties was regarded by the master as a moral offense, punishable with stripes, and by the church as an infraction of the creed.—*Dave v. The State*, 22 Ala. 23; *The State v. Will*, 1 Dev. & Batt. 171; *The State v. Cæsar*, 9 Ired. 391; 2 Pars. Contr., p. 74, § 4; Ruthf. Inst., p. 162; Shelf Mar. & Div., p. 1, *et seq*; *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams, use, &c.*, 11 Ala. 826; *Linds v. Belisario*, 1 Hag. Com. 214; 4 Eng. Ec. 367, 374.

I refer to these authorities to show that the marriages of Cassius Swanson as above stated, were marriages good at common law; that they were legal natural marriages, *jure divino*. They were not then mere adulteries or fornications, nor were the cohabitations for any illegal or improper purpose. Then the offspring of such marriages could not be bastards at common law. They had, in their condition, a legal mother, and they had a legal father, united in such marriage as the law allowed them to contract, which were not unfrequently blessed with the sanction and prayers of the church. They were then undoubtedly legal *quasi* marriages. The unhappy condition of the parties only intervened to prevent these marriages from being perfect in the highest legal sense. The children, then, were not bastards, unless the law makes them bastards; they were not born of an illicit connection; they were not begotten and born out of lawful wedlock. Then, they were not bastards.—2 Kent, 208, 210; 2 Bac. Abr. Bouv., p. 77. They were undoubtedly born within marriages which were legitimate. All children born within such marriages are legitimate. This brings them within



the description of the statute, and the equity of the statute; and also within the policy of the law of the State.—Rev. Code, § 1888.

The former decisions in this State upon the question of slave marriages were made in the interest of slavery. This interest is now overturned, and these cases deserve but little weight.—*Smith v. The State*, 9 Ala. 990; *Malinda & Sarah v. Gardner*, 24 Ala. 719.

Emancipation has restored the former slave to his natural rights. The reason of the old cases is overturned, and the constructions upon which they rested fail to do justice to the citizen. This of itself is a sufficient reason to abandon them. Justice is the law of laws, and these decisions now militate against justice; they are abrogated. *Jus est norma recti; et quicquid est contra normam recti est injuria*.—3 Bulstr. 313; Const. of Ala. 1807, Art. 1, § 15. The unfortunate claimants of the proceeds of their father's toil, should not be made to suffer for a wrong committed, against their mothers, their father and themselves. This would be adding wrong to wrong, without any necessity to vindicate it, except, perhaps, an old prejudice, the basis of which is now swept away forever.—Cons. U. S., Amendm. 13, 14; Acts of Cong., April 9, 1866; Civil Rights Bill; Stat. at Large, 1865, 1866, ch. 31, p. 271.

Then, the appellees are not bastards, and emancipation has restored their heritable blood.—*Gerod v. Lewis*, 6 Mart. (La.) 559. They are the children of a freedman themselves restored to liberty, and as such entitled to inherit his estate.—Rev. Code, §§ 1883, 1897, 1894; Ordn. Conv. 1867, No. 23; Pamph. Acts 1868, p. 175. They are of the whole blood of the father, and the estate comes through him, and each is entitled to a full share of his estate.—Rev. Code, § 1892; *Johnson v. Copeland's Adm'r*, 35 Ala. 521.

The judgment of the court below is affirmed. The appellant will pay the cost in this court and in the court below, to be repaid him out of the estate of said Cassius Swanson in his hands to be administered.

BUCKALEW *vs.* SMITH ET AL.

[MOTION BY SURETY, IN CIRCUIT COURT, TO ENTER SATISFACTION OF JUDGMENT, BECAUSE CREDITOR FAILED TO COLLECT MONEY OUT OF PRINCIPAL DEBTOR WHILE HE WAS SOLVENT.]

1. *Judgment, entry of satisfaction of; what not sufficient to authorize as to surety.*—It is no defense for a surety that his judgment creditor merely neglects or refuses to collect his judgment from the principal, though the principal should become insolvent. Although the judgment creditor stipulates with the principal debtor for delay, so long as the agreement is merely voluntary, and not founded on a valuable consideration, the surety is not discharged.

APPEAL from Circuit Court of Randolph.

Tried before Hon. JOHN HENDERSON.

The facts are sufficiently stated in the opinion.

C. D. HUDSON, for appellant.

JAMES AIKEN, *contra*.

B. F. SAFFOLD, J. —This was a motion by the appellees, to enter satisfaction of a judgment recovered against them and others at the spring term, 1861, of the circuit court, and affirmed at the June term, 1861, of the supreme court.

The ground of the motion was, that the applicants were merely the sureties of S. W. Herren, and they notified the plaintiff to make the money out of the property of Herren when he might have done it, but he neglected and refused to do so until Herren became insolvent. An issue of fact was made up between the parties and submitted to a jury. On their verdict, the court entered satisfaction of the judgment, and rendered a judgment for costs against the plaintiff.

A consideration of the assignment of error respecting the jurisdiction of the court will be decisive of the case.

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The court was asked to enter satisfaction of the judgment, because the plaintiff, after being notified by the sureties to enforce it by execution, neglected and refuse to do so. The creditor who has obtained his judgment, is not bound to active diligence so as to enable him to hold the surety liable. He may delay as long as he pleases. Although he stipulates with the principal debtor for delay, if the agreement be merely voluntary, the surety is not discharged. No agreement will have the effect to exonerate the surety, which is not founded on a valuable consideration, and does not disable the creditor from proceeding to collect his demand.—*State Bank v. Godden & Lowry*, 15 Ala. 616; *Calder v. Vivian*, 8 Ala. 903; *Agee v. Steele*, 8 Ala. 948; *Sawyer v. Bradford*, 6 Ala. 572.

The judgment is reversed. As no cause of action is presented, the cause is not remanded.

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### GUNTER vs. DALE COUNTY.

[SUIT AGAINST COUNTY, UNDER "ACT TO SUPPRESS MURDER, LYNCHING, AND ASSAULTS AND BATTERIES," APPROVED DECEMBER 28, 1868.]

1. "*Act to suppress murder, lynching, and assaults and batteries*," approved December 28th, 1868; *construction of; what not necessary to allege in complaint framed under*.—It is not necessary, in a complaint framed under the "Act to suppress murder, lynching, and assaults and batteries," approved December 28th, 1868, to allege therein that "the murder or assassination was on account of past or present party affiliation, or political opinion." A count which conforms to the requirements of the second section of the act is sufficient without such allegation.
2. *Same; constitutionality of*.—Said act is a valid law of this State. It is not obnoxious to the second section of article 5, of the constitution of Alabama; it is upon but one subject matter, though it deals with several branches thereof.

APPEAL from Circuit Court of Dale.  
Tried before Hon. J. McCaleb Wiley.



The facts are fully set out in the opinion.

W. C. OATES, for appellant.—The language of the section is, “whenever in any county of this State, *any person* shall be assassinated or murdered by any outlaw, or person, or persons in disguise, or mob, &c., \* \* \* the widow or husband of such person, so murdered or assassinated, &c., \* \* \* shall be entitled to recover of the county, in which such murder or assassination occurred, the sum of five thousand dollars, &c., \* \* \* for such murder or assassination, &c.” \* \* \* If the construction of the court below be correct, the words, “any outlaw, or person, or persons in disguise, or mob,” quoted above, are supererogatory and useless, and have no field to operate on. The words in the statute, following those above quoted, “*or for past or present party affiliation, or political opinion,*” do not qualify and limit those used in the preceding part of said section, because the words “*or for*” disconnect the latter part of the section, and is complete within itself, showing that the intention of the legislature was, under the first clause of the section, to make the county liable whenever any person is murdered or assassinated within it by a mob, by a person or persons in disguise, or by any outlaw, without regard to the cause of the killing, and without regard to the motive which actuated the slayer in the performance of the bloody deed. And that the latter clause, to-wit, “*or for past or present party affiliation, or political opinion,*” was intended to fix the liability of the county to pay the penalty whenever a person is murdered or assassinated within it, *by any person whomsoever*, whether disguised or not, an outlaw or a gentleman of former good character, if the murder or assassination be *committed on account of party affiliation, or political opinion* of the person slain. This is the only construction of which the statute is susceptible, to give operation and effect to each part of it.

2. There can be no doubt of the power of the legislature to enact the law. The legislative power of the State is restricted alone by the State and federal constitutions. *Dorman v. The State*, 34 Ala. 216, and authorities there

collected and cited in the opinion of the court; Cooley on Constitutional Limitations, § 7, *et seq.*

The law was passed to prevent the commission of crime, by making the officers and people of the county vigilant in arresting and bringing to justice the greatest malefactors; thus, being a law to promote the peace and tranquillity of the public, it should be faithfully and fully enforced.

This law is not without precedent, as a similar law existed in England for ages, the beneficial effects of which have frequently been alluded to in terms of high commendation.—Hale's Pleas of the Crown, volume 1, chap. 35, and Hume's History of England.

The appellee raises a question as to the constitutionality of the act, under which the suit was brought in the court below. *Tuskaloosa Bridge Company v. Olmstead*, 41 Ala., and *Lapsley v. Weaver*, 43 Ala., when carefully examined, I think, fully settle the question in favor of the constitutionality of the law.

The word "outlaw," used in the statute, has a technical meaning, but the legislature could not have used it in that sense, as "outlawry" is unknown in American jurisprudence. Outlawry is "putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries, &c."—3 Blackstone, 284. Every one in Alabama, or within the American Union, is entitled to the protection of the law, for his life, liberty, and property.—See the constitutions, State and Federal.

W. D. WOOD, and J. M. CARMICHAEL, *contra*.—1. The act of the legislature, which, it is claimed by appellant, confers a right of action in a case like this, it seems, is unconstitutional—1st. Because the subject matter of the act is not clearly expressed in its title; and 2d, because it contains more than one subject.—Sec. 2, art. 4, of the Constitution of the State. It is also unconstitutional, because contrary to natural right, and the institutions and public policy of the State.

2. The manifest object of the legislature in passing this act, was to protect the citizens of Alabama in their

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party affiliations, and in the free exercise of their political opinions, and it is necessary, in an action founded upon said act, to aver that the person was murdered or assassinated on account of past or present party affiliation, or political opinion. The complaint of the plaintiff fails to make such averment. For this reason, as well as because said act of the legislature is unconstitutional, the demurrer to the declaration interposed in the court below was rightfully sustained.

PETERS, J.—This is an action founded upon a statute of the general assembly of this State, entitled “An act to suppress murder, lynching, and assaults and batteries,” approved December 28th, 1868.

The first section of this act is in the following words: “That whenever in any county of this State, any person shall be assassinated or murdered by any outlaw, or person or persons in disguise, or mob, *or for* past or present party affiliation or political opinion, the widow or husband of such person so murdered or assassinated, the next of kin of such person, shall be entitled to recover of the county in which such murder or assassination occurred, the sum of five thousand dollars as damages for such murder or assassination, to be distributed among them according to the laws of Alabama, regulating the distribution of the estates of intestate decedents.”—Pamph. Acts, 1868, p. 452.

Under authority of this act the appellant, Mrs. Gunter, brought suit against the county of Dale on the 28th day of February, 1870. The complaint contained five counts. The first count is copied in the following words, to-wit:

“The plaintiff claims of the defendant five thousand dollars, for that because on or about the 27th day of June, 1869, one William F. Gunter, who at that time was the husband of plaintiff, and whose widow plaintiff now is, was murdered and assassinated in said county of Dale by one Turner Riley, who was then and there an outlaw, and the said assassination and murder was done more than six months before the commencement of this suit, to-wit, on or about the 27th day of June, 1869.”



The other counts in the complaint were similar to this, except in the description of the person who did the killing, or in the manner of the killing, so as to conform to the precise language of the statute in these particulars.

There was a demurrer to the whole complaint. The grounds of the demurrer were as follows—1st. The complaint fails to show a meritorious or any cause of action; 2nd. The complaint fails to aver that the alleged murder or assassination was on account of past or present party affiliation or political opinion; 3d. The complaint fails to state that W. T. Gunter, the alleged husband of the plaintiff, was murdered or assassinated on account of past or present party affiliation or political opinion.

Upon the hearing of the demurrer, the same was sustained by the court. Whereupon the plaintiff took a nonsuit, and appealed to this court. And here the sustaining of the demurrer in the court below is assigned for error. Rev. Code, § 2759.

The second section of the act above quoted directs the manner of proceeding to recover the damages given in the first section of the same act. It is in these words:

“That said damages allowed in section one of this act shall be recoverable in the following manner: The claimant shall, after the expiration of six months from the murder or assassination aforesaid, bring an action in the circuit court of the proper county, by summons and complaint against the county, *alleging the murder or assassination of such person in said county by an outlaw, or person or persons in disguise, riot or mob, and that it was done at least six months before the commencement of the suit.* The subsequent proceedings shall be according to the laws of the State and the rules of practice in suits between individuals.”—Pamph. Acts 1868, p. 452.

A very slight examination of this section of the act in question will show that the complaint is framed in strict conformity to its requirements. This is enough to make the complaint sufficient.—Rev. Code, § 2629; *Randolph v. Sharpe*, 42 Ala. 266; *Letondal v. Huguenin*, 26 Ala. 552. This section of the act which prescribes the form of the action does not require that it shall be alleged that the

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murder or assassination "was on account of past or present party affiliation or political opinion." It was then no error to fail to make this averment in the complaint. This appears also from the language of the first section itself. That clearly shows that the assassination denounced by the law is such as has been committed, (1,) "by any outlaw;" (2,) or by any "person or persons in disguise;" (3,) or by any "mob;" (4,) "*or for* past or present party affiliation or political opinion." The word *or*, as used in this sentence, is separative and alternative. It clearly indicates that any one of several independent particulars may be taken, and it does not attach the incidents of "party affiliation or political opinion" to all the different modes of incurring the penalties of the statute, mentioned in the section. The assassination or murder of any person in this State "for past or present party affiliation or political opinion," is itself such a violation of law as subjects the county to liability for the damages given by the enactment.

There can scarcely be a well entertained doubt in any sane mind that the protection of the life and liberty of the citizen is one of the chief objects of all civil governments. Decl. of Ind; Rev. Code, p. 1. Protection and allegiance are reciprocal. This principle forms the basis upon which all loyalty is founded by which the citizen yields up not only his property but his life for the public good.—*Reed v. United States*, 3 Quart. Law Journ. 122; *United States v. Mose*, 3 Cr. 160; 1 Bla. Com. 306, marg.; 2 Kent, 39, *et seq.* The powers of the government, to devise means for the accomplishment of this important end, are without any limitation. All the criminal law of the State rests upon this basis. Even life may be taken to protect life. And this is the reason which finally underlies the justification of all capital punishments and all fines and imprisonments.—*Oliver v. The State*, 17 Ala. 587. The law does not take an assassin's life in mere revenge or retaliation, but to prevent a repetition of his crime.—Rev. Code, § 3654.

The weight of the most recent decisions of this State is to the effect, that the legislature of the people is supreme in all cases, where there is no limitation imposed by the Federal or State constitutions.—*Dorman v. The State*, 34

Ala. 216, 230; Cooley, p. 85, *et seq.* 572; *People v. Draper*, 15 N. Y. Rep. (Denio) 542; *Thorpe v. Rutland & Burlington R. R.*, 27 Vt. 142. The legislature declares this will by its enactments.

The law involved in this litigation is not a novelty, nor is it founded upon principles which have been tried and have failed, or which have been condemned by statesmen and legislators of the highest ability.

The English government is one of the oldest and one of the most powerful in Europe, and possibly, in the world. And it has been one of the most successful in its efforts to protect the lives, the peace and liberty of its people. From it we derive our social habits and the larger portions of our own law, and the principles by which these laws are justified.—Cooley, p. 21, *et seq.* For the purpose of protecting the citizen against robbery and assassination, that government, from a very early date, made a portion of the people responsible for the robberies and assassinations committed within certain prescribed bounds. This is also a principle of universal national law, as is well known to every intelligent student of history and jurisprudence. This is too well established and admitted to need the quotation of authorities.—Whea. Inter. Law; Lawrence, 173, 179, *Kostza's Case*.

In the common law system, which, to a very great extent, is our system, the legislators of the mother country, taking the natural division of the people into families as a basis, combined these families into tithings; the tithings into hundreds, and the hundreds into counties. The tithing was ten families; the hundred was ten tithings; and the county an indefinite number of hundreds.—1 Bla. Com. 116, 117, (marg.)

The communities of hundreds, consisting of ten families, were held responsible for many mischiefs and robberies, which were committed among them, when the guilty party was suffered to escape without conviction. This is still the law of the mother country, and it has been found to work well in aiding the suppression of secret crime, or as Judge Blackstone says, crimes committed "by persons in disguise or with their faces blacked."—4 Bla. Com. 246,



(marg.); 4 Steph. Com. 275; 1 Hale Pl. Cr. p. 447, Ch. 35, Dublin edition, 1778. The general assembly of this State have in this statute simply applied this ancient, universal, and salutary principle of protection for the lives of its citizens to our own law.

This statute is not obnoxious to the second section of the fifth article of the constitution of this State. It contains but one subject, though it deals with several branches of that subject, but they are all attingent and cognate to one subject matter—the suppression of certain offenses. This is a sufficient compliance with the purpose of the fundamental law, to rescue it from the vice of unconstitutionality.—Const. of Ala. 1807, Art 5, § 2; *Martin v. Hewitt*, June term, 1870.

The judgment is reversed and the cause remanded for a new trial.

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## TOOLE vs. URQUHART.

[ACTION UNDER CODE ON DEPENDENT AGREEMENT.]

1. *Complaint; when sufficient.*—In an action on a dependant covenant or agreement, a complaint which follows the form given in the Revised Code for such action is sufficient.
2. *Agreement to deliver property, action for damages for breach of; when seizure of, by Confederate officer no defense against.*—T. and U. had a controversy about the ownership of a horse. T. threatened to inform a Confederate officer that it was property of the government, it being branded U. S.; whereupon, U., to find out the Confederate officer's intention in relation to the horse, and not to induce him to seize it, went to see him, and was told by the quartermaster that he would seize the horse. After this, U. informed T. of all that occurred, and T. and U. agreed to arbitrate the matters in dispute, and an award was rendered that T. deliver the horse to U., which was accepted by T. and U.,—*Held*, that it was no defense to T., in an action by U. against him on the agreement, that a Confederate quartermaster seized the horse on information gained from U. on his visit to him.

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Toole v. Urquhart.

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APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

This was an action by the appellee, Urquhart, against the appellant, Toole, in the form given in the Revised Code, to recover damages for the breach of a dependent agreement, which agreement, as set out in the complaint, is in substance as follows: "A suit having been instituted in the circuit court by the plaintiff against the defendant for a certain horse, bridle, saddle, and sheep-skin, which suit being then pending and undecided," the parties verbally submitted the matters in controversy to arbitration, and an award was made that plaintiff should dismiss his suit, pay defendant \$300, and pay one-half the costs of suit; and upon this being done, defendant was to pay the other half of the costs of suit, and "deliver to plaintiff said *horse, bridle, saddle, and sheep-skin.*" The complaint then avers the acceptance of the terms of the award by both parties, and a full compliance thereof by plaintiff, and a refusal on the part of the defendant, after demand, "to deliver to plaintiff said horse, bridle, saddle, and sheep-skin, or either of them," to the damage of plaintiff \$1000, wherefore, he sues, &c. [The complaint sets out the names of the arbitrators, and the award, &c., and the manner in which he had complied, &c., in full.]

On the trial, as shown by the bill of exceptions, the defendant demurred in short, &c., to the complaint—1st, because the complaint does not contain a substantial cause of action; 2d, because it does not show any liability of plaintiff to defendant; 3d, because it is too vague and uncertain in its description of the property referred to. The demurrer was overruled, and defendant excepted.

The plaintiff then pleaded, in short, &c., the general issue, with leave to give in any matter which might be pleaded in bar, and plaintiff joined issue with like leave.

The plaintiff, as a witness in his own behalf, testified, that in 1864, he bought a horse branded [U. S.] from one of his neighbors; that at the time of the purchase, he had known the horse in the neighborhood for over a year; that a short time after the purchase, the horse, his bridle, sad-

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dle and sheepskin were stolen, and two or three days afterwards, on learning that defendant had the horse in his possession, he went to see him on the subject, and found the horse, bridle, saddle and sheep-skin in his possession. Defendant refused to give up the horse and things, as he said he had bought them at public auction, in the city of Montgomery, a day or two before. Defendant made some offers in compromise of the matter, not material to be set out, and failing to agree, plaintiff brought an action of detinue to recover "said property," and the record of the suit was offered in evidence along with plaintiff's testimony, but is not set out in the bill of exceptions. Plaintiff further testified that defendant, in the interview, told him he should never have the horse; that from the brand on him he was the property of the Confederate States, and that he intended to report the horse to the Confederate quartermaster, and have him come and take him. After this, plaintiff went to see Cummings, then Confederate quartermaster at Montgomery, and told him the facts in relation to the horse, in order to ascertain what he would do in the matter, and not for the purpose of getting him to take the horse. Cummings informed him that he would take the horse, and told him to tell Toole to bring up the horse, and that Cummings would be after him. After this, plaintiff saw Toole and told him what had occurred, and then Toole and himself agreed to arbitrate the matters in dispute. The plaintiff then testified as to the arbitration, in all respects as set out in the complaint, except that the award of the arbitrators required, upon the payment of the \$300 and half of the costs of suit, and the dismissal of the same by the plaintiff, that the defendant "should *deliver up the horse.*" When the award was made, both parties accepted the same and agreed to abide thereby, and plaintiff dismissed the suit, paid half of the costs, and made the payment as required to the defendant. Plaintiff, several times after this, demanded said horse, bridle, saddle, and sheep-skin, but defendant failed to deliver them, giving as a reason that the Confederate quartermaster, Cummings, had taken the horse.

The defendant was also examined, as a witness in his



own behalf, and testified that he bought the horse, bridle, saddle and sheep-skin, at public auction in the city of Montgomery, a few days before plaintiff claimed them; that although he told plaintiff that he intended to report the horse to said quartermaster, he did not do so, nor had he intended to do so; that when they agreed to go into arbitration, and when a hearing of the parties was commenced before them, he proposed to bring the horse to the store in the city of Montgomery where the arbitration was then going on, so as to be ready to deliver him, if the arbitrators should so decide; that plaintiff declined this proposition, lest Cummings, the quartermaster, should come there and take him, and told defendant to let the horse remain where he was until plaintiff started home, when he would go by defendant's house and receive him there. To a question by defendant, as to what he must do if Cummings came, plaintiff replied, that if he once got him, he would ask Cummings no odds. After the arbitration, plaintiff went off in town to attend to some business, and in an hour or two called for the horse, but some half an hour after the award was made, Cummings, the quartermaster, came with a policeman and took the horse, and defendant never saw him afterwards, except the day afterwards when the horse was sent out of the city, tied to a Confederate wagon. The testimony of defendant agreed with that of the plaintiff, as to the arbitration and the terms of the award, and he admitted the demand on him for the horse, bridle, saddle and sheep-skin, as stated by the plaintiff. The evidence as to the value of the property was conflicting. This was substantially all the evidence.

At the request of the plaintiff, the court charged the jury, "that if they believed from the evidence that before the arbitration defendant told the plaintiff that plaintiff should never have the horse, and that he was the property of the Confederate government, and that he intended to turn him over to a Confederate States officer, and that in consequence of this declaration of defendant, plaintiff went to Cummings, who was a Confederate States officer, to inquire what would be his course under such circumstances,

and not to induce him to take the horse, and that afterwards, and before the arbitration, plaintiff informed defendant what he had done, and that afterwards the parties agreed to arbitrate, and did arbitrate the matter, and defendant, in pursuance of the award, undertook to deliver the horse and failed to do so, in consequence of Cummings taking him on the information given by the plaintiff, and of which defendant had been fully informed at the time he agreed to deliver him,—that the taking of the horse by Cummings under these circumstances would not constitute a defense to this action.” To the giving of this charge the defendant excepted.

The defendant then asked the court to charge the jury, that “if they believed all the evidence in the case, the plaintiff was not entitled to recover.” This charge the court refused to give, and defendant excepted.

The defendant then asked the court to charge the jury, that “if they believed all the evidence in the cause, they must find for the defendant.” This charge the court refused to give, and defendant excepted.

The defendant then “asked the court, in writing, to charge the jury, that if the facts as to the arbitration and award were fully and truly stated by the plaintiff himself, in the testimony given by him as a witness, the jury ought to find for the defendant.” This charge the court refused to give, and defendant excepted. The defendant also “asked the court to charge the jury, in writing, that if the facts as to the arbitration and award were fully and truly stated by the defendant, in his testimony given as a witness, the jury ought to find for the defendant.”

The charge given, and the refusal to give the charges asked, are now assigned for error.

RICE, SEMPLE & GOLDTHWAITE, and A. J. WALKER, for appellant.

FALKNER & HENLY, and WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—The complaint is in the terms of the form prescribed by the Revised Code on a dependen

covenant or agreement. The demurrer was, therefore, properly overruled. The third ground of objection, that the property referred to is insufficiently described, can not prevail, because a precise identification of the property is not a material inquiry in the case, unless made so by plea.

The charge given at the request of the plaintiff was correct. Whether the information given by the plaintiff to the Confederate quartermaster ought, under other circumstances, to affect his right to recover, it was made known to the defendant before his agreement with the plaintiff. Both acted with a full knowledge of the consequences to be apprehended on that account.

All of the charges asked by the defendant were properly refused. The proposition of the defendant to bring the horse to the place of arbitration, that he might deliver him, if required to do so, and its declination by the plaintiff before the decision of the arbitrators, was not a delivery. It might have been so construed by the jury if made afterwards.

The testimony of the plaintiff, that the award required the defendant to deliver the horse, can not be considered as a failure to prove that he was not to deliver the other articles claimed, when taken in connection with the testimony of both parties that the plaintiff lost them, and they came into the possession of the defendant, with the horse, and were demanded of him by the plaintiff, without objection on his part. Even if this were not so, as the verdict was not obliged to be for the value of all the property claimed or none, we can not presume that it was not erroneously for all, when the defendant failed to take advantage of any defect of proof, by asking specific charges.

The judgment is affirmed.

NOTE BY REPORTER.—Afterwards, appellant, by RICE, SEMPLE & GOLDTHWAITE, applied for a rehearing, and filed in support thereof the following argument :

It is a universal rule that under a count upon a *special contract*, the plaintiff can not recover without proving, in substance, the very contract described in the count. It is



also a fixed rule, that a plaintiff may defeat a recovery by him, by *unnecessary particularity* in describing the cause of action in his count. The law holds him sternly to the proof of matter of description, although the description was *unnecessarily particular*.—*Dill v. Rather*, 30 Ala. 57; especially in the paragraph next before the last of the opinion in that case, and see cases there cited. This rule holds good in equity as well as in law.—*McKinley v. Irvine*, 13 Ala.

Appellant contends, that under a count upon a special contract, the plaintiff can not recover, if the proof only shows a contract *materially* different in any respect whatever from the contract as described in the count. Here the variance is perfectly plain. The count describes the contract as one embracing four articles, to-wit, a horse, a bridle, a sheep-skin, a saddle. The contract, as proved by each witness, was one which did not embrace the *four* articles named, but only *one of them*, to-wit, the horse. There can not be, in legal contemplation, a clearer case of variance between the *contract as described*, and the contract as *proved* by both witnesses.

The charges asked by the defendant are all founded on the well settled law of variance between the *allegata* and *probata*, and if Chitty and all the other authorities are right, these charges ought to have been given.

Chitty states the general rule as follows: "The contract must be stated correctly, and if the evidence differ from the statement, *the whole foundation of the action fails*."—1 Chitty's Pl. 305, *et seq.*; *Moseley v. Wilkinson*, 18 Ala. 288; *Jordan v. Roney*, 23 Ala. 758; *Smith v. Causey*, 38 Ala. 665; Greenleaf on Ev. p. 74, § 63, 12 ed.

The legal proposition, thus stated by Chitty, is precisely the proposition which, in substance, is announced and applied in the charges asked.

The plaintiff was at liberty to sue for all the articles, or for a portion only. But if he elected to proceed for all, and to state the contract (that is the submission to arbitration) as embracing *all of these*, he can not recover *under such statement*, any one of them, when the proof of each witness showed that the contract embraced *only the horse*. *There was never any submission as to the other articles*; and

in suing on the *submission and award*, the plaintiff was bound to state the same "*correctly*." This he did not do; and by the charges asked the defendant took advantage of the incorrect statement. The law allows this to the defendant; and it is done properly.

SAFFOLD, J.—The application for a rehearing is based on the allegation that a verbal contract, by which the appellant, on certain conditions, was to deliver up to the appellee, a horse, bridle, saddle, and sheep-skin, is not sustained by proof of an award that a horse only was to be delivered.

The doctrine of variance is that the allegations and proof must not be different and contradictory. In this case, the evidence of the appellant as much confirms the allegations of the complaint as that of the appellee. Immediately after the award was made, the plaintiff demanded of the defendant all of the articles claimed in this suit. The latter admits the demand, and testifies that he had them. They were rather incidental to the horse, and, from all the evidence, we can not say the jury was not authorized to find that they were understood to be included in the award.

We still do not think the evidence justified the first two charges asked by the defendant. The last two rested the case, first, on the plaintiff's testimony alone, and next, on the defendant's alone. We think, whether either one separately made out the case or not for the plaintiff, both together did.

The rehearing is denied.

## EX PARTE SOUTH AND NORTH ALABAMA RAIL-ROAD COMPANY.

[APPLICATION FOR MANDAMUS TO COMPEL CIRCUIT COURT TO SET ASIDE ORDER OF CONTINUANCE AND TO DISCHARGE A GARNISHEE UPON ANSWER.]

1. *Mandamus*; *when will not lie*.—A *mandamus* will not lie to compel a judge of the circuit court to set aside an order of continuance of a garnishment for further answer pending in that court, unless, perhaps, the power to continue the cause has been corruptly used.
2. *Same*.—While an order of continuance of a garnishment suit in the circuit court remains in force, the supreme court will not grant a *mandamus* to inquire into the propriety, or impropriety, of the refusal of the circuit court to discharge a garnishee upon his uncontested answer in the circuit court, when the cause purports to be continued for further answer.

This was an application to this court for a *mandamus* to compel the circuit court Montgomery county, Hon. J. Q. SMITH, presiding, to set aside an order continuing a garnishment suit for further answer, and refusing to discharge the garnishee upon his uncontested answer. The facts of the case are set forth sufficiently in the opinion.

SAMUEL F. RICE, for petition.

JEFFERSON FALKNER, *contra*.

PETERS, J.—This is an application for *mandamus*. It has now been too long and thoroughly settled by the decisions of this court, to admit of doubt, that “an application for a *mandamus* will only be granted when the petitioner shows a clear legal right, and there is no other legal remedy to enforce it.”—*Tarver v. Commissioners’ Court of Tallapoosa*, 17 Ala. 527, 528; *Chisholm v. McGhee*, 41 Ala. 192; *Ex parte Garland*, 42 Ala. 559.

It is not necessary to discuss the merits of the answer of the petitioner to the garnishment in the case out of which this application has arisen, but only so much of the



proceedings therein as may show the grounds for the relief sought in this petition.

The petition and the record thereto appended, which is made a part of the petition, show that Jefferson Falkner recovered judgment against Francis M. Gilmer, jr., and Merriwether L. Gilmer, in the circuit court of Montgomery county, in this State, at the January term thereof, in 1869, for the sum of ten thousand and five dollars, besides costs; upon which judgment execution had been issued. Upon this judgment a process of garnishment was regularly sued out of said circuit court, on the 14th day of January, 1870, against the petitioner, said South and North Alabama Railroad Company. This process of garnishment was duly served upon said railroad company, which appeared by its proper officer in said circuit court, at the June term thereof, in the year 1870, which is now in session, and made answer to said garnishment, which answer was reduced to writing and ordered to be filed as a part of the record in the cause in which said garnishment had been issued. This answer, the said Falkner, the plaintiff in said judgment, declined to contest. And thereupon said Falkner, said plaintiff, moved said circuit court to continue said garnishment suit for further answer from said garnishee, said railroad company. To this said railroad company objected, and moved the court to discharge said garnishee. Both these motions, by consent, were considered together, when the court refused to discharge the garnishee, and continued the cause until the next term of the court. To this action of the court the garnishee separately, and severally excepted, and reserved the same in a bill of exception.

And now, the said railroad company, comes here upon this record, and moves this court for a *mandamus*, to be "directed to the Hon. J. Q. Smith, judge of said circuit court, commanding him to set aside said order of continuance of said cause, and prescribing such order as petitioner is entitled to in the premises."

The continuance of a cause, or the refusal to continue it in the circuit court, is purely a matter of discretion. With such discretion this court has no power to interfere, unless,

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Ex parte South and North Ala. R. R. Co.

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perhaps, it has been corruptly used.—*Planters' Bank v. Willis & Company*, 5 Ala. 770, 779. In *Ex parte City of Montgomery*, Chief Justice CHILTON says: "Should this court interpose its jurisdiction to control the inferior courts in the exercise of their discretion, either in the making or continuing of interlocutory orders, or in refusing to make them in the progress of causes, it would be difficult to calculate the delay, embarrassment, and inconvenience which would result, not only to suitors, but to the courts themselves."

"If every order of continuance, every refusal to grant new trials, and the numerous interlocutory orders which are made in causes, both at law and in equity, from their inception to their final termination, could each be made distinct subject-matter for an appeal to this court, at the hazard of a heavy bill of costs, this court would become an intolerable grievance, and there would be no end to the litigation to which a cause, requiring a great number of such orders, might be subject."—24 Ala. 98, 99.

It is very evident that if this court should assume, by *mandamus*, to interfere in the control of *one* matter of discretion in the exercise of their jurisdiction by the inferior courts of the State, it might interfere with *all* matters of a like character. Then every contested order for a continuance, in every court of the State, would in this way, sooner or later, be brought here for review. This would be an *intolerable grievance* indeed. Such has not heretofore been considered the office of the important writ of *mandamus*. It is not granted to control matters of discretion.—24 Ala. 98, 99, *supra*; *Gay v. Bridge*, 11 Pick. 189; *Ex parte Fleming*, 4 Hill, 581; *St. Luke's Church v. Slack*, 7 Cush. 226.

An order of continuance has the effect to postpone further action in the cause by the court, until the next term of the court to which the cause has been continued. No further order can properly be taken in the cause, except possibly to set the order of continuance aside, until the order of continuance has expired. In this view of the practice, this court would be precluded by the order of continuance from looking into the refusal to discharge the garnishee,

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Jones, Judge of Probate, v. Page & Stallworth.

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Therefore, no opinion is intended to be given upon the propriety, or the impropriety, of the refusal of the circuit court to discharge the petitioner from making further answer to the garnishment. The petitioner's right, when he shows sufficient cause to be discharged at the proper time, and in the proper way, is unquestionable; but the denial of this right is a matter of error, which may at the proper time be brought to this court by appeal. The remedy for its correction is ample, without resort to the process of *mandamus*.—*Ex parte Elston*, 25 Ala. 72, 73; Rev. Code, § 3485, 2984.

The application for *mandamus* is denied, and the petitioner, said railroad company, will pay the costs of the application.

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JONES, JUDGE OF PROBATE, *vs.* PAGE & STALL  
WORTH.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *Occupations; right of State to tax.*—The State has the right to tax occupations.
2. *Revenue act of 31st December, 1868; construction of.*—The revenue act approved December 31st, 1868, requires each lawyer composing a firm to pay the price prescribed for lawyers for a license, which entitles him to practice his profession in any county of the State.
3. *Same, § 120 of; does not confer judicial power on auditor.*—Section 120 of that act does not confer upon the auditor any judicial authority. It only makes him, to the extent therein expressed, chief of the revenue department to insure uniformity in the execution of the law throughout the State.

APPEAL from Circuit Court of Conecuh.

Tried before Hon. P. O. HARPER.

The opinion contains the facts.



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Jones, Judge of Probate, v. Page & Stallworth.

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JOSHUA MORSE, Attorney General for appellant.

PAGE & STALLWORTH, *contra*.

[The briefs did not come into Reporter's hands.]

B. F. SAFFOLD, J.—The appellees, who were lawyers associated together as a firm, paid to the county treasurer twenty dollars, as the price of a license to practice law, under the revenue act of December 31st, 1868. They presented the receipt taken therefor to the appellant, and demanded the license for the firm, which he refused to issue, as not being for the amount required, under instructions from the State auditor. The circuit court, on their application, issued to him a peremptory mandamus to give the license, from which he appeals.

The several questions presented in argument may better be considered generally than by direct reference to each one, except the main issue involved, the construction of the revenue law.

The right to tax is an incident of sovereignty and co-extensive with it.

All subjects, over which the sovereign power of a State extends, are objects of taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission. These conclusions were declared by the United States supreme court, after most elaborate discussion and mature deliberation, in the cases of *McCulloch v. The State of Maryland*, 4 Whea. 316; and *Weston v. City Council of Charleston*, 2 Peters, 449. It has also been conceded by the same high authority that the State may tax occupations.—*Brown v. Maryland*, 12 Whea. 419. The private revenue of individuals arises ultimately from three different sources, rent, profit and wages, and every public tax must be finally paid from some one or all of these different sorts of revenue.—Smith's *Wealth of Nations*, (B.) 5, Ch. 2, p. 2.

Section 120 of the revenue act does not confer any judicial authority upon the auditor. It only makes him, to the extent therein expressed, chief of the revenue system, to insure uniformity in its operation throughout the State.

The real issue involved in this case is whether the revenue law, approved December 31st, 1868, exacts the price of a license therein prescribed for lawyers, from each individual composing a firm, or from the firm only. Section 106 of the act enacts "that any person, firm, company or corporation, who desires to engage in, or carry on, any business or profession hereinafter named, he, or they, shall pay to the treasurer of the county in which it is proposed to carry on such business or profession, the amount required by law for such license, taking his receipt therefor." Section 107 provides "that upon presentation of such receipt to the probate judge, if found to be for the amount required, he shall forthwith issue the license, which shall set forth the name of the person, firm, company or corporation, the business which it is proposed to carry on, and the location where it is to be established, or, if a peddler, whether he proposes to travel on foot, on a horse, or in a wagon; and such license shall not be transferable, nor shall it entitle the holder thereof to carry on or exercise any other business or profession, than the one therein named, nor at any other location than the one therein specified, &c." Section 112 enacts "that the prices of licenses shall be as follows: 19. For lawyers, twenty dollars."

If we regard the sections above quoted alone, the construction of them might well be either that each individual must pay the price of the license, or that a firm, company or corporation should be regarded as an individual; and in the latter case, that the business or profession must be carried on only in the county in which the license was issued. But if we consider the nature of the several occupations for which a license must be obtained, that some are obliged to be stationary, while others are ambulatory, we are led to the conclusion that the terms person, firm, company &c., must be applied and confined to the various pursuits enumerated, according to their respective character and field of operation. Where the terms of the law are doubtful enough to admit of it, we may also look to the practice of the United States government, and the

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McKinney v. Reynolds, Auditor.

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former usage of this State, under similar laws, to arrive at the true intent and meaning of the particular law.

We therefore sustain the ruling of the auditor that each lawyer should pay the price prescribed, (twenty dollars,) for a license, which shall entitle him to practice his profession anywhere in the State, as the most just and equitable construction of the statute.

The judgment is reversed. The appellees are charged with the costs of this court and of the court below.

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McKINNEY vs. REYNOLDS, AUDITOR.

[APPEAL FROM ORDER REFUSING MANDAMUS.]

1. *Sheriff's fees in criminal cases; when payable by the State.*—The third clause of section 4340 of the Revised Code, provides for payment by the State of the sheriff's fees in criminal cases, except when the defendant has been convicted or a *nolle prosequi* entered, in which case they are payable by the county. Where the costs have been taxed against the prosecutor, or the foreman of the grand jury, there must be a return of execution "no property found."

APPEAL from City Court of Montgomery.  
Tried before Hon. JOHN D. CUNNINGHAM.

The opinion contains the facts.

THOS. M. ARRINGTON, for appellant.  
JOSHUA MORSE, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The appellant applied to the city court of Montgomery for a *mandamus* to the auditor of the State, to audit certain accounts which he, as sheriff of Limestone county, claimed to be a charge against the State. The application was denied.

The items of the accounts are fees in criminal cases, for



executing warrants of arrest, taking bail bonds, serving subpoenas, and committing prisoners to jail; services for which payment is allowed by section 4339 of the Revised Code. Section 4340 provides for their being taxed against the defendant on conviction, or against the prosecutor or the foreman of the grand jury, in cases of misdemeanor, under section 410; and if not taxed against them, or if an execution against them is returned "no property found," they must be paid by the State, except when they are payable by the county. Section 4438, page 847, makes them a charge against the county in cases where the defendant is convicted, and shown to be insolvent by a return of execution "no property found," and in which the State enters a *nolle prosequi*.

The accounts are certified to be correct by the clerk of the circuit court and sworn to before the probate judge, and are accompanied by the affidavit of the sheriff, as required by law. They contain items for services rendered in cases in which the defendant was convicted or acquitted, a *nolle prosequi* was entered, and the prosecution was abated by the death of the defendant. The State is liable only where the defendant was acquitted, or the prosecution was abated.

The judgment is reversed, and a *mandamus* will be issued from this court to the auditor to audit the appellant's account in these last named cases.

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### HILL, ADM'R, vs. ERWIN ET AL.

[DEBT ON PROMISSORY NOTE GIVEN TO SECURE PURCHASE-MONEY OF LAND SOLD  
UNDER AN ORDER OF PROBATE COURT IN 1863.]

1. *Decedent's lands, sale of, under order of probate court; promissory note given to secure purchase-money of, what defense can not be set up against. In an action of debt on a promissory note, for "dollars," given to secure the purchase-money of lands of a decedent, sold in this State, in*

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Hill, Adm'r, v. Erwin et al.

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the year 1863, under an order of the probate court for the payment of debts, it can not be shown in defense, after the return and confirmation of the sale in the probate court, that the sale was for Confederate treasury-notes, and not for "dollars," in some lawful currency of the United States. (SAFFOLD, J., *dissenting*.)

2. "*Dollars*;" *meaning of*.—If such a sale is permitted to stand, the word "dollars" in such note must be construed to mean such dollars as would be a legal tender in payment of debts. (SAFFOLD, J., *dissenting*.)

APPEAL from the Circuit Court of Hale.

Tried before Hon. JOHN MOORE.

The facts upon which the case turns are sufficiently set out in the opinion.

ALEX. WHITE, for appellant.

[Appellant's brief did not come into Reporter's hands.]

WM. M. BROOKS, *contra*.—The main question raised by the charges asked on behalf of the plaintiff, is, whether an administrator who sells land under the order of the probate court can make an agreement to receive Confederate money in payment, which will be available to the defendants?

The court authorized the sale of the property upon a credit of twelve months. Confederate notes were at that time, and it was evident would continue to be for a long while then to come, the common currency and only circulating medium of the country. All property was sold for and paid in that kind of money. It stood as the measure of the value of property whenever it was sold. There was no other means whereby to estimate the value of property. The sale, though made under the orders of the court, was not made, and was not expected or intended to be made, upon terms different from those upon which sales were generally made. It could not be expected that a purchaser would bid the value of the land in depreciated currency, and pay the amount thus bid in good money. The authority on behalf of the administrator to agree to take Confederate money might be well implied. Under no other circumstances could a sale have been made for the price bid.

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But the cases are numerous to show that an administrator can enter into binding stipulations not apparently authorized by the order of sale. He may warrant the soundness of the property sold, and in such case a breach of warranty would enable the purchaser to defend an action on the note for the purchase-money.—*Stoudenmire v. Williamson*, 29 Ala. 558; *Pow v. Bradley*, in manuscript.

He may commit a fraud upon the purchaser, and in such case the purchaser can set up the fraud as a defense to the suit upon the note given for the purchase-money.—*Atwood's Adm'r v. Wright et al.*, 29 Ala. 351; *Rice v. Richardson*, 3 Ala. 428.

In these cases the administrator was not authorized by the court to warrant the soundness of the property in the one instance, or to *perpetrate a fraud* upon the purchaser by misrepresentation in the other; yet, in either case, his acts were held to be binding upon the estate and available to the purchaser. These cases clearly lay down and settle the principle in controversy. The land was sold at its value in Confederate notes, (which was several times its value in good money,) to be paid for in the same kind of currency; to hold the purchaser bound to pay the amount in good money, would be a gross fraud upon him. And however innocent the court or the distributees might be in the inception of the contract, yet if they attempted to make the purchaser pay the entire amount in good money, they would be participators in the fraud.

In legal contemplation, it is as much against conscience to attempt to avail one's self of the iniquity of an agent, after it is known, as if there had been preconcert.—29 Ala. 351; 3 Ala. 428.

And though the administrator was not authorized to deceive and defraud the defendant, and thereby procure a much larger price for the property, yet it would be as iniquitous to enforce the payment of the entire amount in good money, as if the court had expressly authorized the perpetration of the fraud.—29 Ala., *supra*.

PETERS, J.—This was an action of debt brought by Susan Hill, as the administratrix of the estate of Charles



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W. Hill, deceased, against George Erwin and Allen C. Jones, on a promissory note for \$40,386 98, payable to said Susan Hill, as administratrix as aforesaid. It was tried in the circuit court of Hale county, on the 10th day of October, 1867, when a verdict and judgment were rendered for the defendants, Erwin and Jones. From this judgment, Mrs. Hill appeals to this court.

From a bill of exceptions taken at the trial, it appears that Mrs. Hill, as the administratrix of the estate of her husband, Charles W. Hill, deceased, obtained an order of the probate court of the county of Greene, in this State, to sell the real estate of said deceased for the payment of debts. This order of sale seems to have been regularly made and granted, and under its authority, and in conformity to the same, she offered for sale certain lands of her said husband, which are described in said order by their proper land office designation, on the 10th day of February, 1863. At said sale, said Erwin became the purchaser of said land, at the sum of \$40,386 98, and gave his note for this sum, with securities as required by law, payable on the 1st day of March, 1864. The proceeding on this sale was returned to the judge of probate, who had ordered the same, and the sale was confirmed as required by the statute in such case made and provided. The order and sale upon the face of the record appear to have been perfect and regular. It was a judicial sale. The law, then, fixes its terms, and denies to the administratrix the power to sell on any other terms. But there is no attempt to impeach the regularity of the sale.

The only question, then, raised is, whether a sale by an administratrix of the real estate of the deceased for the payment of debts, which appears regular on its face, and which purports to have been made on a credit for a certain sum, payable in "dollars," can be shown, in such a proceeding as this, to have been made for Confederate treasury-notes or bonds.

Such a sale must be for money; either to be paid down at the conclusion of the sale in cash, or at a future time, on the termination of the credit allowed. But when the debt thus contracted becomes due, it must be paid in

money, unless the representative choose to release it, for something else in lieu of money, which the law permits her to receive. In this sense, money means a currency, which is a legal tender in payment of debts, or a currency which is convertible into silver or gold.—*Kitchell, Adm'r, v. Jackson*, June term, 1870; Const. U. S., Art 1, §§ 8, 10. This is the legal effect of the sale, and the parties had no authority to disregard it. At law, the sale is not open to explanation on this question. It could just as well be permitted to be shown, against the averments of the record, that there was no sale, as to be shown that there was an illegal sale. If the sale stands, it must stand as the law requires it to have been made; because the law, through the agency of the probate court, dictates the terms of the sale. If the record shows that these terms have been complied with, it can not be shown that the record speaks falsely. The order of sale and the confirmation of the sale are a part of the record, and these show the terms of the sale and a compliance with them, in the sale.—*Saltonstall and Wife v. Riley et al.*, 28 Ala. 164; Rev. Code, §§ 2079, 2078, 2080, 2081, 2082, 2086, 2089, 2090, 2091, 2095.

The laws of this State in force at the commencement of the late rebellion continued in force until its suppression, except, possibly, the statute of limitation.—*Michael v. The State*, 40 Ala. 361; *Coleman v. Holmes*, January term, 1870. And there was no competent authority within the State during the rebellion to enact valid laws. The legislature of the insurgent government, in this State, during this period, can not be regarded as a lawful legislature, or its acts as lawful acts—*Texas v. White*, 7 Wall. 700, 732. There was no law, then, passed by the insurgent government, in this State, during the insurrection, that can, in any manner, effect this sale, or which can make Confederate treasury-notes money, in the sense that is contended for by the appellees.

Confederate treasury-notes can not be said to be "money" in any just legal sense whatever. They were the creatures and offspring of a political organization, which was forbidden by law. The power that put them in circulation

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refused to make them a legal tender in payment of debts. They were issued to aid the military operations of the insurgents, in their attempt to overthrow the government of the Union. They were contraband and illegal, as the instruments of an illegal purpose. It would seem childish and silly to suppose, that a war, of the magnitude of the late rebellion, could be carried on, for any considerable length of time, without money or credit. Money the rebels did not have; and the Confederate treasury-notes supplied them with credit. They were a portion of the hostile machinery of the insurrection. They were wholly vicious, because they were the creatures and instruments of a vicious purpose. It is a well known historical fact that the rebel army could not have been kept in the field after the success of the national blockade of the Southern ports, without their instrumentality. To give them validity or credence in any sense is to affirm, so far, the validity of the power that brought them into being. If rebellion is treason, if levying war against the government is treason, they were tainted with treason through and through. They owed their very being, their intent and their use, to this source. They could not, then, be "money" in any constitutional legal sense. The only legal money known in the Union, then or now, was that which the law of the land recognized as a legal tender in payment of debts, or that which was convertible into such legal tender currency.—Const. U. S., Art 1, §§ 8, 10; *Hepburn v. Griswold*, 8 Wall. 603; *Powell, Adm'r, v. Henry*, 27 Ala. 612; *Aicardi v. Robbins*, 41 Ala. 541.

Confederate treasury-notes never did come up to these requisites. Their very payment was, from the beginning, highly problematical, and in the end, they became mere nullities.—40 Ala. 451. Such a currency was not that which was contemplated by the statute authorizing and regulating the sale of decedent's estates, for the payment of debts, by their representatives. These notes were not the lawful circulating medium of the country.—*Mann v. Mann, Exr's*, 1 John. Ch. pp. 231, 232; Co. Litt. 207, a; 13 East, 20; *Hale Houston v. Sims & Co.*, January term, 1870; 8 Bac. Abr. Bouv. p. 37, (B.) 8.



The Confederate States government had no authority to do any legal act which, on account of its origin, was entitled to recognition as of legal force in any legal rightful court of the rightful legal State of Alabama. In law it is unknown as a legal, lawful authority. Its force may create a necessity, which may excuse the commission of an illegal act. But this necessity, like any other excuse or license, is a matter of defense, and must be alleged and proven.—3 Stark Ev. 1151, marg. x, 1; Greenlf. Ev. § 79. The insurgent governments were all illegal governments. The purpose for which they were erected made them illegal and wholly void.—7 Wall. 700, 732, *supra*. This was an illegal purpose. They were erected to carry on a war against the government of the United States; treasonable in its character. They did not grow up out of any overruling necessity. They were established for the purposes of treason. This inevitably made the whole bad. There was no necessity to justify them. They were, therefore, in a legal sense, wholly illegal and wholly vicious. They were not like the case at Tampico in Mexico, or that at Castine, in Maine. In both these latter instances, a legal, rightful and *acknowledged* government, by force of arms, in a lawful war, drove out a lawful, rightful, *acknowledged* government, and took its place, for a legal, rightful purpose—a purpose justified and allowed by the laws of nations.—Const. U. S., Art 3, § 3, cl. 1; Paschall's Ann. Const. p. 211, note 215; *Ex parte Bollman*, 4 Cranch, 75; *Burr's Trial*, 4 Cranch, 469, *appendix*; *Patton, Governor, v. Gilmer*, 42 Ala. 548; *United States v. Rice*, 4 Wheat. 246; *Fleming v. Page*, 9 How. 603. Here there was no such thing as legal authority, in any of the Confederate governments. They were mere military dominations. They had no national *acknowledgment* as governments of any kind. They were, therefore, necessarily *unknown* to the courts of the rightful, lawful government, as political powers in any recognized, legal sense. Their *de facto* character did not confer any legal powers upon them, or upon their acts. They were nullities, in law. Such are the doctrines taught in *Scott v. Jones*, 5 How. 343, and *Luther v. Borden*, 7 How. 1, 38, at bottom. It seems to me, that to

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set them up as legal and authoritative *de facto* governments, without competent legislation for that purpose, is a fatal mistake. This would be, in a greater or less degree, a destruction of all rational distinction between patriotism and treason, loyalty and disloyalty to the government of the Union.—*Vide Walker, C. J., arguendo, in Watson & Wife v. Stone*, 40 Ala. 451, 465, par. 4; *Lawrence's Wheat. Intern. Law*, page 226, note. In point of law, it is the purpose, the intent, which makes the act vicious and void, not the person who commits it, or the manner in which it is done. 42 Ala. 548, *supra*; 7 Wall. 732, *supra*; *Kennett v. Chambers*, 14 How. 39; 1 Russ. Cr. 1. Does the grace or skill with which the fatal blow is stricken, or the numbers or high standing of those who strike, turn murder into manslaughter? Is a fleet of piratical ships more lawful than five, or does the crime diminish as the power to commit it becomes more dangerous and irresistible? Certainly not. No such doctrines have yet found secure lodgment in the courts of this country, and it may be hoped that they never will. Chief-Justice Marshall, in *Bollman's* case, alluding to treason, but holding the balance of justice with a giant's hand, has said, "as there is no crime which can more excite and agitate the passions of men than treason, no charge demands more, from the tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the facts or to the law, none can be more solemn, none more important to the citizen or to the government; none can more effect the safety of both."—4 Cranch. 125, at bottom. It is, in my judgment, a matter equally as solemn and important to the safety of the government and its loyal citizens, that governments erected to commit this great crime shall not have recognition in the courts of this State, as legitimate political organizations in any sense whatever, without the aid of legislative ratification or adoption.—Conv. 1867, Ordins. Nos. 16, 37, 28, 39, 40; Pamph. Acts, 1868, pp. 167, 185, 186, 187.

This case is different from that of *Thorington v. Smith*, 8 How. 1. In that case the parties made the terms of their contract themselves; and they could affix whatever

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meaning they pleased to their words. They could make the word "dollars" mean gold or "greenbacks," or Confederate treasury-notes, if they wished it. And if there was an ambiguity about its meaning, as they applied it, this ambiguity could be removed by parol proofs. It could be thus shown what they intended by the word.—1 Greenlf. Ev. § 288. They might also measure the price in cotton or tobacco, or any other specific thing. But in this case, the law fixes the terms of the contract and the meaning of the words used. This contract the parties can not contradict or explain, so as to defeat the purpose of the law. There is no duplicity about the language or the purpose of this contract. It is as the law required it to be made, and it can not be altered by parol explanations. It must, therefore, stand as it is written.—Greenlf. Ev. § 275, *et seq.* Confederate treasury-notes can not supply the place of money in this instance. They are not "dollars." in such a case as this.

The fourth charge asked by the appellant, in the court below, was in conformity with this construction of the law, and it was error to refuse it.

It is presumed that this exposition of the statute regulating the sale of the real estate of decedents, by their representatives, will furnish a solution of all the other questions raised upon the bill of exceptions in this case; therefore, they will not be further considered.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

The chief-justice concurs in the result of this opinion.

B. F. SAFFOLD, J., (*dissenting.*)—Inasmuch as the probate court was authorized, and almost required to regard Confederate treasury-notes as a valid payment for land sold under its decree, if the evidence showed the vendee purchased it with the understanding that it might be paid for in such currency, and on that account brought a nominal price greatly in excess of its value, it seems to me that he is entitled to relief as in cases of individual contracts.



GOODRICH *vs.* GOODRICH.

[BILL IN EQUITY FOR DIVORCE, ON GROUND OF CRUELTY, AND FOR GENERAL RELIEF,]

1. *Divorce ; when will be granted on slight indications of peril to wife.*—The christian interpretation of the contract of marriage requires that the husband shall love the wife ; that “he shall delight in her as in himself,” and when the proofs show that he habitually fails to do this, the courts, upon very slight indications of peril to her of body or health, will interpose for her protection, by divorce.
2. *Same ; what sufficient evidence of cruelty to justify.*—If the conduct of the husband is shown to be habitually cold, indifferent, rude, harsh, vulgar, obscene, and profane, towards the wife, and she is seen shortly after being with him, in the privacy of the marital relation, in tears, with bruises on her face, lips, and side, of a serious character, and the husband admits, when complained of, that these indications of bad treatment were produced by him, his explanation that they were given in playfulness and jest, and not in anger or in earnest, will not be sufficient to rescue his “conduct” from the construction that these appearances are evidences of legal cruelty, sufficient to justify a divorce in favor of the wife for that cause.
3. *Children, custody of ; when should be granted to the mother.*—Upon a dissolution of marriage, by divorce in favor of the wife, if she has possession of the children of the marriage, who are of tender years, two being girls and the other a boy, and it appears that the mother is a woman of polite education, and of an amiable disposition, and virtuous, and if it appears that the father is habitually rude, profane, vulgar, obscene and hypocritical in his conduct, and insulting in his language to females in his household, with some evidences of a tendency to drunkenness, cold and indifferent to his children, and disposed to sell them to their grand-mother “for cash,” and denounces them as “damn nasty babies” of whom he is tired—in such a case the children will not be separated, or taken from the care and tuition of the mother.
4. *Dwelling-house, &c. ; when wife will be protected in possession of, by injunction.*—If during marriage, the husband conveys or causes to be conveyed to the wife, by deed, a house and lot, in which they then are residing, for the purpose of securing it from confiscation on account of the husband’s participation in rebellion, and he received and holds possession of the deed for her, and if he is insolvent or likely to become insolvent, and has received moneys or estate belonging to the wife, as her separate property, of considerable value, under the laws of this State for the protection of married women, upon a dissolution of the marriage by divorce in the wife’s favor, she will be protected in her

possession of such house and lot, and the furniture therein, by injunction against the husband's claim.

5. *Deposition, suppression of; when will not be allowed, unless adverse party shows actual injury.*—The suppression of a deposition, on motion of the adverse party, because the witness had been furnished with a copy of the interrogatories, and cross-interrogatories, before the examination by the commissioner, will not be allowed, unless the party complaining shows actual injury to him by such practice. In such a case error will not be presumed.
6. *Same; English orders and rules of practice; how regarded.*—The English orders and rules of chancery practice, in such cases, are not to be regarded as peremptory, but only "as furnishing proper analogies to regulate the practice" in our courts.—Chancery Rule 7, Revised Code, p. 824.
7. *Deposition, suppression of; when failure or refusal of witness to answer interrogatories will not be cause for.*—The refusal or failure of a witness to answer a question, addressed to her on an examination before the commissioner, will not be held a sufficient reason to suppress such deposition on motion of the adverse party, when it appears that the interrogatory is sufficiently answered in another portion of the deposition, or that the answer would be immaterial on the trial on the merits of the cause.
8. *Decree in chancery; when improper ruling as to parts of interrogatories, &c., will not reverse.*—When there are numerous objections to parts of interrogatories, some of which may have been improperly decided in the court below, a decree in chancery will not be reversed, if it appears that there is sufficient testimony, beside that objected to, to sustain the chancellor's decree.

APPEAL from Chancery Court of Dallas,  
Heard before Hon. J. Q. LOOMIS.

The opinion sufficiently states the facts.

ALEX. WHITE, for appellant.

MORGAN & LAPSLEY, *contra*.

PETERS, J.—This suit is a bill in chancery by Mary W. Goodrich, complainant, against Rosamond C. Goodrich, defendant. It was filed in the chancery court of Dallas county, on the 1st day of March, 1867, for a divorce, dissolving the bonds of matrimony between the parties in favor of the wife, on the ground of cruelty, and prayed an injunction restraining the defendant from interfering with the control and custody of the children of the marriage, and to prevent the defendant from removing the furniture

from the house in which the complainant resided, and from all interference with complainant by personal constraint or violence, and a decree to require him to account with her for the *corpus* of her separate estate, which had been received by him during the marriage, and for general relief.

As is required in injunction suits, the statements of the bill are sworn to by the complainant, and the defendant is required to answer, without verifying his answer by his oath.— Rev. Code, § 3328.

The defendant, at first, suffered the bill to be taken as confessed, but afterwards, he appeared and had the decree *pro confesso* set aside, and filed an answer. In this answer, besides a general denial of the acts charged against him, as constituting cruelty, he sets up as a plea of condonation, that the acts complained of were “of ancient date.”

The bill shows that the marriage took place on the 22d day of August, 1860, and that the parties had lived together for a little more than six years and six months. Besides the general bad conduct of the defendant by unmerited abuse and insult to the wife, which seems to have prevailed during almost the whole term of their married life, the bill alleges that the defendant had, upon several occasions, stricken complainant on the face, and in the mouth, and had once kicked her in the side, with his booted foot, with such violence as to produce a serious bruise, which remained visible for two months after the kick was inflicted, and which so affected the health of the wife that she was forced to take frequent potions of laudanum, in order to obviate the effects of a premature birth.

On the hearing, the chancellor granted a decree divorcing the wife, and made the injunction perpetual, which had been previously allowed, in reference to the custody of the children, and certain property mentioned in the bill, as being in possession of the wife at the time when the bill was filed; the defendant was also taxed with all the costs. From this decree the defendant appeals to this court.

Marriage is admitted to be founded on agreement between the parties, and in some form it is a social necessity; even the beasts and the birds, under its influence, “pair



off" by mutual consent, and are, usually, while the relation lasts, governed by its high and delicate sollicitudes. With them the matrimonial life is one of the most diligent assistance, and tender and affectionate regards. If they enjoy any feelings that may be called sacred, they spring out of this great relation.

As we ascend higher in the scale of animal organization, and contemplate our own race, we find that marriage has, more or less, connected itself with the sacred rites of the people of all nations. Some have even thought that its influence does not terminate with life, and that it is indispensable for happiness in the life to come.

This important contract is acknowledged in all christian countries, to impose upon the parties to it something beyond the mere obedience of the wife towards the husband, and mere protection and maintenance on the part of the husband towards the wife. It is undoubtedly a contract at common law.—*Campbell's Heirs v. Gullatt and Wife*, 43 Ala. 57. It has been said, by the highest authority, that christianity is a part of the common law.—*Ormishund v. Barker*, Will's Rep. 538 ; 8 John. 291 ; 5 Binn. 555. Yet, although this may not be the law of this State to the same extent that it has been declared in England, it certainly enters, in no small degree, into the ascertainment of social duties, when the statute law is silent on the subject. It must also be granted, that whatever is irreligious, in most instances, is wrong, and in many it is illegal.—2 How. U. S. Rep. 127, *et seq.*

The law requires that the wife shall obey all the just and reasonable marital commands of the husband, and it requires that the husband shall protect and maintain the wife, according to his station in life ; that is, according to his means. It also refuses to sanction any "conduct," on the part of the husband, beyond what may be necessary to accomplish these important ends. But christianity goes much further. It requires that the husband shall love the wife ; that he "shall delight in her as in himself." *Itaque et vos singuli, suam quisque uxorem, ita diligeto, ut se ipsum; uxor autum videto, ut revereatur virum.*—*Pauli's Epist. ad Eph. chap. 5, v. 33*, Beza's Translation, New Testament, 2d

revision, p. 371, at bottom. And the great apostle gives the most conclusive reason for this injunction. He says: "He that loves his wife, loves himself. For no man ever hated his own flesh; but nourishes and cherishes it."—New Testament, *ut supra*. The law does not attempt to enforce this important rule, but it so far recognizes the necessity of its spirit, as to feel that the wife is safe so long as she is under its protection; but when this shield of her security is withdrawn, then her peril begins. The law, equally with nature, clothes the husband with the highest and most ample authority to protect the wife. He may slay in her defense, as for himself.—3 Wash. C. C. 515. And so long as he loves her, or—in the language of religion—so long as he "delights in her as himself," all experience shows that he will protect her. But when the husband's love no longer exists, then the wife's protection becomes uncertain. When this uncertainty grows so great that the wife is evidently imperiled and made unhappy to such a degree as to effect her health, and interfere with the discharge of her duties as a mother, then the courts will interpose for her protection,

A marriage may therefore be legal, though there is no love, in the apostle's sense, on either side. Nevertheless, it may be doubtful whether it may be said to be a christian marriage, in the absence of this important element. Hence, all christian marriages may reasonably be presumed to have had this important ingredient, as one of the inducements which led to its consummation. To hold otherwise, would be to insinuate that the christian, in this great relation, would belie his faith and creed.

Archbishop Rutherford, one of the most able and eminent of the commentators on Grotius, has placed marriage among the natural rights of men. He defines it in these words: "Marriage is a contract between a man and woman, in which, by their mutual consent, each acquires a right in the person of the other, for the purpose of *their mutual happiness* and for *the production and education of children*. Little, I suppose, need be said in support of this definition, as nothing is affirmed in it, but what all writers upon natural law seem to agree in."—Ruthf. Insts. of Nat.

Law, p. 162 ; 1 Bish. on Mar. and Div. § 3, 29 ; 2 Kent, 74, 75 ; 6 Bac. Abr. Bouv. p. 454 ; 2 Bouv. Law Dict. 12th ed. p. 105.

Mr. Parsons, referring to the same subject, in a late work of the highest authority, uses like language. He declares that "the relation of marriage is founded on the will of God, and the nature of man ; and it is the foundation of all moral improvement, and all true happiness. No legal topic surpasses this in importance ; and some of the questions which it suggests are of great difficulty."—2 Pars. on Contr. p. 74.

The law of this State declares that the purpose of this great contract has failed when the husband treats the wife with cruelty, and it allows a divorce in her favor, "when the husband has committed actual violence on her person, attended with danger to life or health ; or when, *from his conduct*, there is reasonable apprehension of such violence. Rev. Code, § 235.

Here the proofs show, most clearly, that the husband did not love his wife ; that he did not delight in her as in himself. She complained of a gross insult offered her, by him, on the bridal trip to New York, in the first month after the marriage. To strangers he was of genteel and pleasing address ; with his wife and children he was "indifferent, cold, harsh, fault-finding and unpleasant," and he repelled their demonstrations of affection. He habitually addressed her, at home among her own family, as "a damned fool," "a damned liar," and "a damned lazy woman." He obscenely told her that she always went *backwards* when she attempted to do any thing about the household ; he ridiculed and scoffed at her dress and appearance, and said she was "sloomy," and looked like an "Irish biddy ;" he told her he would see her "damned and in hell," or "dead and damned," before he would grant her a trifling and customary favor, almost always allowed to ladies in her station in life ; he threatened to abandon sleeping in the same bed-chamber with her, because he was *tired* of her "damned nasty babies ;" and, in the presence of other females, he indecently told her "to kiss unmentionable parts of his body." And, in the end, he proposed to leave her, and



go away and never return, if her mother, a widowed lady, whose fortune had been ruined by the late rebellion, would pay him a certain sum of money "in cash." These are but portions of the enormity that complainant was called to bear of this character, and they are facts in the husband's *conduct*, during the six years of his wedded life, about which there is no plausible contradiction in the evidence, and to the proof of which there can be no sufficient objection. It is true, that these acts of extreme vulgarity and rudeness, alone, would not justify a divorce in favor of the wife, though they might wholly undermine her peace of mind and health; but they show the *animus* of the husband, and afford the court a measure by which to estimate the import of other acts of a more violent character. For this purpose they are legitimate.—*Elmes v. Elmes*, 9 Barr, 166. It is true that the husband pretends, in his answer, that these exhibitions of extreme incivility to his wife were extorted from him by her high and peevish temper. But this, were it so, is neither an excuse nor a justification for them.—*King v. King*, 28 Ala. 315. But the testimony does not sustain this pretension. The wife is shown to have been an amiable and well educated woman, and the defendant admits that her virtue was above suspicion; and he shows no justifiable reason, whatever, for his abusive conduct towards her.

But going beyond this ill-treatment, by insulting language, there must be some evidence of bodily ill-treatment or an actual and serious apprehension of it.—*Bryant v. Bryant*, 34 Ala. 516, 519; *Smedley v. Smedley*, 30 Ala. 714. It appears from the testimony of Mrs. Norris, the mother of the complainant, who is shown to be a lady of superior intelligence and the highest credit, that she lived with her daughter for several years after her marriage with the defendant, and during this time the complainant frequently appeared with serious injuries upon her person. Once her cheek was wounded, once her lips were bruised and bleeding, and once there was a contusion on her side, which was swollen and discolored with coagulated blood, and remained sore for above two months, just before the birth of one of complainant's children; and when she chided the defend-

ant as the author of these injuries, he admitted them, but insisted in explanation that they had been accidentally or playfully inflicted. He also promised reform and amendment; but the reform and amendment never came. This testimony of Mrs. Norris is fully corroborated by that of several other witnesses, who, at various times, resided in the same habitation with the complainant and the defendant. I, therefore, think that the chancellor did not commit any error in decreeing a divorce in favor of the complainant in the court below. The ground alleged in the bill was sufficient and amply proved.—*Moyler v. Moyler*, 11 Ala. 620; *Hughes v. Hughes*, 19 Ala. 307; 30 Ala. 714; *Reese v. Reese*, 23 Ala. 755.

As a general principle, upon the separation of the husband and wife, the father is entitled to the custody and control of the minor children, because he is bound for their maintenance and support.—*Ex parte Boaz*, 31 Ala. R. 425. But upon a divorce, the court may decree the custody of the children to either party.—Rev. Code, §§ 2367, 2397. The provision of the Code upon this subject is in these words: "Upon granting a divorce, the court may give the custody and education of the children to either father or mother, as may seem right and proper; having regard to the moral character and prudence of the parents, the age and sex of the children; and pending the suit, may make such orders in respect to the custody of the children as their safety and well-being may require."—Revised Code, § 2367.

It appears that the parties to this ill-starred marriage had three children—one boy and two girls. The oldest, the boy, was six years old in June, 1867, and the youngest was fourteen months old when the bill was filed, on the first of March, 1867, and the other was four years old in July, 1867. The two younger children were too infantile to bear separation from the mother. Their very tender years still needed the ceaseless and delicate attentions of a mother's love. No one else could fill her place, without more or less of jeopardy to the safety and well-being of these little ones. As they had but one brother to whom they would have to look, in future life, for manly guidance and protec-

tion, it was improper to separate them, short of the strongest reason for such a course. This reason is not shown in the proofs.

It appears that there were twenty-nine witnesses, whose evidence was put in upon the hearing for the complainant. Some twenty or more of these speak of the character of the complainant, her education and conduct. Many of these knew her intimately, from early childhood to the filing of the bill in this case; and they testify, without exception, that she was well and politely educated in the best schools of the country, that she was lady-like in her conduct and amiable in her disposition, and that her attention to her children was tender, diligent and affectionate, and that she nursed them with untiring care and assiduity when sick, even at the peril of her own health.

On the other hand, the character and conduct of the father, at home, is shown to be cold and indifferent to his children; he spoke of them as "damned dirty babies," who so much annoyed him as to threaten to drive him from his customary bed in his wife's sleeping apartment. He refused or failed to aid his wife in nursing them, when they were complaining; and when the older little girl was very unwell, and supposed to be in danger of death, the only consolation he had to offer to her mother, who expressed her fears of the child's extreme danger, was, that "if the child died, let her die;" he would have her "decently buried." He is also shown to be a father, at home among his family, much given to obscene, rude and profane language, and inclined to drunkenness, after the filing of the bill in this case.—*Bryan v. Bryan, supra*.

Under such a state of facts, the chancellor acted very properly in decreeing the control and education of the children to the mother, and restraining the father, by injunction, from interfering with her in the discharge of her duties towards them in this particular.

One other question, arising upon the merits of this cause, remains to be disposed of. It is the title to the house and lot conveyed to the wife during the late rebellion, and the furniture which was in the house at the filing of the bill in this case.



The proof shows that there was an actual conveyance of the house and lot, in the city of Selma, by deed, made by Mrs. Norris to the complainant in the year 1863. This conveyance was made at the request of the husband, and by his express direction. This seems to have been done in the presence of the wife, and by her consent. And when the deed was finished, it was proposed by the maker of the deed, in the presence of the husband, to put it into the keeping of the wife, but she directed to have it given to the husband, as the witness says, to hold for the wife. The husband so took charge of it, to hold for the complainant. This undoubtedly conveyed the legal title to her.—17 Ala. R. 89; *Goree v. Walthall*, *Adm'r*, January term, 1870.

Notwithstanding this, the defendant contends that he paid the whole purchase-money for the lands thus conveyed to the wife, out of his own funds; and explains that the deed was made to complainant, in order to avoid the loss of the lands by confiscation by the government, by reason of the husband's treason, during the late rebellion. There is not any sufficient proof of this purpose, or that the complainant received the conveyance under any agreement or understanding to hold the land thus conveyed in trust for the husband. A husband may make a valid gift to his wife, during coverture, out of his own property, and it vests a good title in her, both at law and in equity.—*Goree v. Walthall*, *Adm'r*, January term, 1870. Besides, the defendant does not come into this court with clean hands. Upon his own explanation, his conduct was not untinged with a purpose of fraud against the government. He admits that he had committed treason against his country, and then he plots to defeat the government of the right that might and did arise, under this treason, to his lands. It would be an approval of such conduct to give the defendant the aid he seeks. But the proofs do not show any thing more than a simple gift to the wife. The proofs wholly fail to show a conveyance upon trust or condition for the husband's use. It must, therefore, stand as it appears; as a conveyance of the absolute estate to the wife. It also appears that the husband had received a much

larger amount of the wife's separate property than the value of the furniture. The decree of the chancellor on this question is, therefore, also free from error.—*Marsh v. Marsh*, 43 Ala.

The motion to suppress the depositions of Mrs. Norris, Mrs. Parkman, James E. Caldwell, and others, was made upon the grounds that the witnesses had been furnished with copies of the interrogatories and cross-interrogatories before they were called upon to be examined by the commissioner, and they had examined them, and had, some of them, prepared their answers and written down their depositions before they were called before the commissioner to testify. The proofs show that copies of the interrogatories and cross-interrogatories were furnished the witnesses before they were examined by the commissioner, and that Caldwell had prepared a written "memorandum" to which he frequently referred while answering, but the commissioner could not state whether it was a full answer or answers or not. This motion is made upon the respondent's construction of one of Lord Clarendon's orders, directing the manner that the examiner shall proceed to take deposition, in the English courts of chancery.—2 Dard. Ch. Pr. p. 1061; Gres. Eq. Ev. p. 53; *Shaw v. Lindsey*, 15 Vt. 381, marg.; 3 Greenl. Ev. § 324.

This objection, so far as I know, is novel in our courts. Undoubtedly, by the practice in this State, the complainant may show a witness a copy of the interrogatories upon which he intends to call upon him to be examined. He would be entitled to a copy of the interrogatories filed by the opposite party, and having such copy, there is no reason why it may not be shown to his witness.—Rev. Code, p. 830, rule 49. If this may be allowed without injury in reference to the interrogatories in chief, then it seems that for a like reason the same practice might be applied to the cross-interrogatories. *Ubi eadem ratio, ibi idem lex*.—7 Coke, 18; Broom's Max. p. 64. The orders above referred to, as fixing the practice of the English courts of chancery in like cases, have never been adopted as positive rules by our courts or by statute, but they may be looked to "as furnishing proper analogies to regulate the practice."—Re-

vised Code, p. 824, rule 7. It must, therefore, be shown that injury has accrued from the practice here complained of, before a deposition will be suppressed for this reason. And no such injury is shown in this case, or pretended. The English rules and orders above referred to are, at best, but guides to aid the discretion of the court, and they will not be enforced, unless it shall be made to appear that the court has injuriously exercised its discretion. The other portion of the objection is not sustained by the proof. A witness may use a memorandum to refresh his memory, under the discretion of the court, when he needs it.—Phill. Ev. p. 419, Notes by C. & H., part 1, p. 441, note 273.

The chancellor did not err in overruling these objections.

There is also another series of motions to suppress these depositions, or a portion of them, on other grounds, which were overruled by the chancellor, and which are insisted on as error. The objection is, that certain of the cross-interrogatories were not answered, or evasively answered. This objection seems to be rather technical than substantive. One or two instances of the grounds of these objections may serve as a fair sample of all the rest. Mrs. Norris was asked, "whether she did not, or had not talked over with the other witnesses what they would *swear* in in this case." She answered, that she "had talked with them about the matter." She was again asked whether she had not, in a certain locality and during certain years, spoken "in high praise and commendation of the defendant;" she answered, "I spoke well of respondent whenever my friends would speak of his conduct. I think I may have so spoken of him in the years mentioned."

It is contended that this answer was evasive, because the witness does not disclose whether she spoke "in high praise and commendation" of defendant or not, at the place and time referred to. This would almost appear like trifling, in so serious and painful a litigation, did not the very great ability and admitted eminence of the learned counsel, who have so liberally indulged in this sort of practice, in this case, altogether forbid such a conclusion. A deposition will not be suppressed on account of a failure to an-



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swer a question, if the facts sought to be elicited can be ascertained from other parts of the deposition, or are immaterial.—*Black v. Black*, 38 Ala. 111 ; *Spence v. Mitchell*, 9 Ala. 744 ; *Buckley v. Cunningham*, 34 Ala. 69 ; *Gibson v. Goldthwaite*, 7 Ala. 281 ; *Aicardi v. Strange, Murray & Co.*, 38 Ala. 226.

Here the facts sought to be elicited by the questions supposed to be evasively answered, or answered insufficiently, or not at all, are wholly immaterial, upon the merits of the case. No responsive answer that could have been given to them would alter the determination of the case. They, almost without exception, intended to impeach the testimony of Mrs. Norris and other witnesses, who confess a leaning to the complainant in this suit. But the character of Mrs. Norris and the other witnesses, who concur with her in her statements, in reference to the defendant's cruel and shameful conduct towards his wife, almost during the whole term of his married life, leaves no doubt in my mind of her truthfulness, and of his guilt.

The other objections to specific questions and to certain other portions of the evidence, need not be examined in this opinion. If they were all sustained it would not alter the judgment of the court. There is abundant testimony besides the matters thus objected to, to sustain the decree of the chancellor below.

It may be proper to add, that the proofs show that the defendant was a person of polite address, when abroad from his own family ; moral in his deportment, and of good business habits, and that he furnished his wife with enough to eat of suitable quality of provisions, except on one occasion, when he refused or failed to provide her the means for a dinner, which her mother supplied for her ; and he also afforded her a sufficiency of suitable, handsome and costly wearing apparel. But this seems to have been done as much for his own gratification as to render the complainant comfortable and happy. Yet to a refined and educated woman, accustomed to be caressed and admired, as ladies in her station in society usually are, what are baubles such as these in comparison to the love and sympathy of her husband ? They are as nothing ! The chain

that binds a wife and mother to unmerited insult, blows and degradation, before her friends and family, is not the less galling and insupportable, because it is woven of gold and decorated with silks and gems.

Let the decree of the chancellor in the court below be in all things affirmed, and the appellant, Rosamond C. Goodrich, will pay all the costs in this court and in the court below.

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GARRETT ET AL. vs. LYNCH, ADM'R.

[APPEAL FROM ORDER DISSOLVING INJUNCTION.]

1. *Bill in chancery; when without equity.*—Where the allegations of a bill, filed to enjoin a judgment at law, show that there was a well ascertained and sufficient remedy at law, it is without equity, unless it also shows that the defense at law was unknown to complainant at the time of the rendition of the judgment; and if the bill fails to show this, an injunction staying the collection of the judgment will be dissolved, on motion, in vacation, made under provisions of section 3438 of Revised Code.
2. *Injunction; when will be dissolved.*—An injunction will be dissolved upon the denials of one of the defendants, upon whom the *gravamen* rests, where there are several, and all have answered, if the denials are full and complete.

APPEAL from Chancery Court of Limestone.

Heard before Hon. WM. SKINNER.

This was a bill in equity, filed by the appellants against the appellees, praying for injunction to restrain the collection of a judgment at law against them, founded on a promissory note given by them for lands sold by appellee, Lynch, as administrator of Thomas Lynch, deceased. The bill alleges, among other things, that the sale of lands was void; that the administrator sold them without having obtained the proper orders and authority for such purpose from the probate court; that the note given for the pur-

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chase was without consideration; that there was no petition filed in the probate court alleging the grounds necessary to give the probate court jurisdiction to order a sale; that parties interested were not notified; that there were minors, who were heirs-at-law of said estate, who had not been brought before the court, and who were not represented by guardian *ad litem*; that the sale of the land has never been confirmed; that the sale of the land, thus made by the administrator, was not only void, but was a fraud upon the purchaser, &c." The administrator and heirs-at-law of Thomas Lynch, deceased, are made parties defendant to the bill. Upon bond being given, an injunction was issued, as prayed for.

The defendants all answered the bill, denying all of its material allegations, so far as known to them. The defendant, Darius Lynch, from personal knowledge, flatly and fully contradicted, and denied the allegations of the bill, upon which its equity rested, and the defendants demurred to the bill for want of equity.

Afterwards, upon the coming in of the answers, on motion, before the chancellor in vacation, the injunction was dissolved. The dissolution of the injunction is the only error assigned which need be noticed.

J. N. MALONE, and WALKER & JONES, for appellants.

HOUSTON & PRYOR, *contra*.

PETERS, J.—The complainant in a bill in chancery is not only a pleader, but also a witness. He is entitled not only to make a clear and orderly statement of the facts on which his suit is founded, but so far as this statement is not denied or contradicted by the answer of the adverse party, it is to be taken as proved or admitted.—Gresham's Eq. Ev. pp. 8, 9; Rev. Code, §§ 3327, 3390, 3391. But that eminent good faith, which is a prevailing principle in courts of equity, requires that the statement thus permitted should be fairly made, without attempt at suppression or evasion. When this is not done, it leaves room for very great uncertainty in the mind of the court, when seeking to ascertain the true import of the allegations made



in the bill. Here the statement of facts in the bill upon which its equity is based, is seemingly that the order of the probate court for the sale of the lands of Thomas Lynch, deceased, was so irregular as to be void, for want of conformity to the statute.—See *Satcher v. Satcher's Adm'r*, 41 Ala. 26. But there is no allegation that this irregularity was unknown to the complainants at the date of the judgment, which is sought to be enjoined, or at the time of the sale. If the note on which the judgment was founded was without consideration, void or fraudulent, as is stated in the seventeenth and eighteenth paragraphs of the bill, this was a sufficient and well ascertained defense at law.—1 Parson's on Cont. 353, *et seq.*; 2 *ib.* 379. It was, therefore, necessary to allege in the bill, that some competent reason intervened to prevent the interposition of such defense, upon the trial at law. This additional allegation was required to sustain the equity of the bill. If there was a valid defense at law, then there should have been an excuse shown for failing to plead it. This is not done. The bill, then, is without equity in this particular.—*McCollum v. Prewett*, 37 Ala. 573; *Weaver v. The State*, 30 Ala. 535; *French v. Garner*, 7 Porter, 549. This deficiency in the bill was sufficient to justify the dissolution of the injunction.—*Cave v. Webb*, 22 Ala. 583.

But, even if this were otherwise, the facts upon which the equity of this case is presumed to rest are fully and directly met and denied in the answer of Lynch, the administrator. This would authorize the injunction to be dissolved.—Hilliard on Inj. p. 99, § 53; *Saunders v. Cavett et al.*, 38 Ala. 51; *Hogan v. Branch Bank*, (at Decatur,) 10 Ala. 485; *Dunlap v. Clements et al.*, 7 Ala. 539.

Then, without going further into the merits of the case, we feel constrained to approve the action of the learned chancellor, in the court below, in dissolving the injunction. His decree is therefore affirmed, with costs of the appeal in this court and the court below,

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Wood et al., Adm'rs, v. Sullens et al.

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## WOOD ET AL., ADM'RS, vs. SULLENS ET AL.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN, FOR UNPAID PURCHASE MONEY OF LAND, SOLD AT ADMINISTRATOR'S SALE.]

1. *Notes given for purchase of decedent's lands, sold under order of probate court; what liens create, how can not be waived.*—Notes given for the purchase-money of a decedent's land sold by the administrator on a credit, in accordance with an order of the probate court for the purpose of paying the debts of deceased, create a lien in favor of the estate of the decedent for the payment of the purchase-money. The administrator has no authority to release such lien until the whole purchase-money is paid.
2. *Same; lien for, may be enforced by administrator de bonis non.*—Such lien may be enforced in equity by the administrator *de bonis non* of the estate of such decedent.
3. *Same; when separate notes, each constitute a lien on whole tract of land.*—In such a case, if an entire tract of land be sold in one body at the same sale, and not by parcels, then the notes given for the purchase-money at such sale, whether they be given by the same parties or by several different parties, in several notes, are each and all invested with the right of lien for the purchase-money upon the whole tract of land sold, until all are paid.

APPEAL from the Chancery Court of Autauga.

Heard before Hon. J. Q. LOOMIS.

The facts of the case are fully stated in the opinion.

G. A. NORTHINGTON, for appellant.

WATTS & TROY, *contra*.

PETERS, J.—In this case the bill shows that John Wood, as the administrator of the estate of Richard Martin, deceased, did, on the 20th day of December, 1858, proceed and sell certain lands belonging to the estate of said deceased at public outcry in the town of Autauga-ville, in the county of Autauga, in this State, under a decree of the probate court of said county, granted for that purpose; that at said sale James A. Sullens and Reuben Underwood became the purchasers of said land,

under the name and style of Sullens and Underwood, at the aggregate price of \$15,090.00; that said Sullens and Underwood complied with the terms of said sale by executing their promissory notes, payable to said John Wood as administrator as aforesaid, each, for a certain portion of said land. Sullens and Underwood divided said lands after said purchase by agreement entered into between themselves, and gave separate notes each for his own part; that is, Underwood executed his two notes for the sum of \$3,772.50 each, one payable twelve months after date of said sale, and the other payable twenty-four months after said sale; and said Sullens also executed two notes, the one due in twelve months after date of said sale, and the other in twenty-four months after said sale, and each for the sum of \$3,772.50. Each of said notes were payable to said John Wood as administrator as aforesaid. Said sale to said Sullens and said Underwood was joint, and they became joint purchasers of said land, and at their special request and for their own convenience, said John Wood permitted them to give separate notes as aforesaid. Said Sullens and said Underwood went into the possession of said lands under said sale. Said sale was regularly reported to said probate court of said county of Autauga, on the 17th day of January, 1859, and was in all respects ratified and confirmed by said court. All of the said notes were paid, except one executed by Sullens for \$3,772.50, and payable twenty-four months after said sale, to-wit: on the 20th day of November, 1860, which remained wholly unpaid in principal and interest. The said John Wood, said administrator, died on the 27th day of April, 1867; whereupon Philip A. Wood and John A. Wood, complainants in this suit, were duly appointed administrators *de bonis non* of the estate of said Richard Martin, deceased, to succeed said John Wood in said administration; and as such they filed this bill against said Sullens and said Underwood, to enforce the vendor's equitable lien upon said land for said purchase-money remaining due and unpaid, on said note of said Sullens. Sullens and Underwood are made parties to the bill, and required by note in writing at the bottom thereof, to answer fully all the material para-



graphs of the bill, which are numbered from one to six, consecutively.

The defendants put in a joint answer, in which they admit the sale of the land under the decree, but deny that it was a sale to Sullens and Underwood, but admit that the land was bid off by Sullens, and afterwards divided between Sullens and Underwood, and they separately gave their notes for the separate parts of each, as stated in the bill. They deny that they owned the whole track jointly, but only each one his part. They allege and prove that Underwood, by agreement between himself and Sullens, was to have all the land east of Ivey Creek, and that Sullens was to have the rest; and said administrator being informed of this division, assented to the same, and thereupon agreed to receive the notes of Sullens for his part of the lands, and the notes of Underwood for his part; and Sullens was not to be liable for Underwood's notes, nor Underwood for Sullens' notes. In accordance with this arrangement the parties executed their notes, each for his own part of the land. Underwood paid all his notes, and Sullens all his but the last, which was wholly unpaid.

Upon the hearing, the chancellor dismissed the bill as to Underwood, and decreed a sale of the lands west of Ivey Creek, which were those claimed by Sullens. From this decree the complainants appeal to this court, and assign the dismissal of the bill as to Underwood, and his refusing and failing to decree that all the lands mentioned in complainant's bill be sold in accordance with the prayer of the bill, and the decree rendered, as error.

The equitable right of the vendor of lands sold upon credit, to hold the same subject, in equity, to the payment of the purchase-money, is one which adheres to the whole tract sold. And in sales by administrators, the administrator himself has no power to release this right of lien. His authority is to sell as the law directs, and the vendor's lien is an incident of the sale, and he can no more release the one than he can set aside the other. As long as such a sale stands, the lien stands.—2 Story Eq., § 1217, *et seq.*; 4 Kent, 151, 152, marg.; 2 Sugd. Vend. 856, bottom page and notes; Adams Eq. 128, marg.; *Bishop v. Snell*,

37 Ala. 9; *Helvenstein v. Higgason*, 35 Ala. 259; *Winter v. Rose*, 32 Ala. 447; *Brooks v. Woods*, 40 Ala. 538; *Houston v. Stanton et al.*, 11 Ala. 412; *White v. Stover et al.*, 10 Ala. 441; *May v. Lewis*, 22 Ala. 646; Rev. Code, § 2079, *et seq.*, 2090.

There was but one sale by the administrator in this case, and the whole tract of land was sold in one body, and not in parcels. And it is through this sale that Underwood gets any title to the lands he claims. It is from the administrator of Martin that he must get his titles and not from Sullens. If the sale stands at all, it must stand as a sale of the whole tract of land in a body; for this was the only sale that was made. There was no sale by parcels. The answer shows this beyond all question; and as Underwood claims a part of the land, he must have derived his title from this sale, because there was no other made. The arrangement between Underwood and Sullens had nothing to do with the sale by the administrator. The lien follows the sale by the administrator, and it rests upon the whole of the land, and is only discharged when the whole purchase-money is paid.—Revised Code, § 2096. Underwood is not security for Sullens' note, but the whole of the tract of land, which was sold, is. If Underwood should set up in his defense that he was a purchaser from Sullens, it would not avail him, because Sullens purchased subject to the vendor's lien; and as Underwood acted with a full knowledge of this lien, he can not now evade it. It follows the land as a security for the payment of the purchase-money, in such sales, until the title is completed. The chain of title shows when the land is paid for, and is notice to all who deal with it.—*Johnson v. Thweatt*, 18 Ala. 741.

The chancellor, therefore, erred in dismissing the bill as to Underwood, and failing to decree the whole tract of land sold, subject to the vendor's lien, for the whole price, of which the note of Sullens formed a part. It is a doctrine of the courts of chancery, that equality is equity. Then, as between Sullens and his co-defendant, Underwood, justice might require that the lands in the possession of Sullens should be first sold, before resorting to

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 Wade v. Pope et al.
 

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those held by Underwood, but the frame of the pleadings has not been adjusted to deal with any other question than that of the lien of the vendor.

The decree of the chancellor is reversed, and the cause is remanded for further proceedings in the court below, in conformity with this opinion. The appellees will pay the costs in this court and the costs of this appeal in the court below.

NOTE BY REPORTER.—The opinion in this case was delivered at the June term, 1869, and upon application by appellees for rehearing, was held under advisement until the January term, 1870, when the following response was made by—

PETERS, J.—The bill shows that there was but one order for the sale, but one sale, and but one confirmation of this sale, and that Underwood and Sullens were joint and not several purchasers. The private agreement of Underwood and Sullens, after the sale, to divide their lands, could not alter the sale or its legal effect. The lien of the vendor extended to the whole tract, and this could not be discharged except by a payment of the whole price. The rehearing is refused, with costs.

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### WADE vs. POPE ET AL.

[BILL IN EQUITY TO SUBJECT AN ESTATE KEPT TOGETHER UNDER A WILL, TO THE PAYMENT OF PROPERTY BOUGHT FOR, AND SERVICES RENDERED TO, THE ESTATE, AT THE REQUEST OF THE EXECUTRIX.]

1. *Trust estate; liability of, for services rendered at request of trustee.*—One rendering services to a trust estate, under the employment of the trustee, has no redress against the trust for the debts thus contracted, except to subject an equitable demand of the trustee to the payment of such debt.
2. *Same; when executrix liable at law as executrix.*—An executrix with



power to "carry on" the testator's farm as he did in his life-time, is a trustee; and if the will gives her authority to contract debts for expenses incidental to the management of such estate, she is liable at law for such debts as such executrix. A party having a claim against such executrix can not go into chancery in the first instance to enforce its payment, except to reach equitable assets.

3. *Same; when executrix not liable as executrix in equity.*—An overseer who has rendered services for such executrix and purchased mules, at her request, for the purpose of carrying on such farm, can not, after suing her and recovering judgment against her in her individual capacity, go into chancery against her as such executrix, to enforce the payment of such judgment at law.

APPEAL from the Chancery Court of Autauga.

Heard before Hon. J. Q. LOOMIS.

This was a bill in equity filed by the appellant, Wade, against the appellees, Matilda F. Pope, as executrix of the last will and testament of Zachary Pope, deceased, and the heirs and devisees of said estate, and sought to charge the estate for the payment of wages due appellant as overseer employed on said estate, and for mules purchased and paid for by him for the estate, and used in carrying on the farm, at the request of the executrix.

The bill charges, that under the will the executrix was authorized to contract debts in carrying on the farm; that the services rendered by complainant were necessary, useful and beneficial to the estate, and that the mules purchased were necessary to carry on the farm, and beneficial to the estate; that before the filing of the bill complainant recovered a judgment at law against said Matilda F. Pope, individually, upon which execution was regularly issued and returned "no property found;" that said Matilda F. Pope qualified as executrix under the will, and has ever since, and is now, acting as executrix of said estate; that a large amount of land and personal property of said estate is still in the hands of said executrix. The bill prays that an account may be stated, and that so much of the estate as may be necessary be sold in satisfaction of complainant's claim.

The will of Zachary Pope is made an exhibit to the bill. That portion of it relating to the powers of the executrix is as follows: \* \* \* "Then it is my will that all of my

property—that is, land, negroes, stock of all kinds, and all other property—is to remain in the possession of my wife, Matilda F., and to be managed by her in the same manner I have been in the habit of doing; that is, she is to carry on the farm, sell the crops, pay debts, school the children, and to carry on all the business in the best manner she can for the benefit of the family. All this she is to do without giving security,” &c.

On motion of the respondents, the chancellor dismissed the bill for want of equity, and this action is now assigned for error.

WATTS & TROY, and CLEMENTS & WILLIAMSON, for appellant.—On the facts stated, we maintain that the bill contained equity. On the facts stated, the complainant was entitled to have the estate of Dr. Pope charged with the payment of the claim of complainant. The case of *Jones v. Dawson et al.*, (19 Ala.,) on the authority of which the chancellor dismissed this bill, does not support the decree of the chancellor. On the contrary, the reasoning of the court will authorize relief to the complainant in this case. In the case of *Jones v. Dawson, supra*, the trustee was not authorized by the deed creating the trust to charge the trust estate by his contracts. In that case, no suit was brought at law against the trustee; but resort was had in the first instance to the chancery court, and there was no averment of the insolvency of the trustee.

In the case at bar, the executrix, Mrs. Pope, had authority to contract debts on the faith of the estate, given by the terms of the will; and it is shown that Mrs. Pope was sued to insolvency before the filing of the bill.

The case of *Coopwood v. Wallace*, (12 Ala.,) as to the 2d head-note, is overruled in *Jones v. Dawson*. That head-note holds that the persons performing the services for the trust estate may proceed in equity at once without resorting to courts of law against the trustee. In the case of *Mulhall v. Williams*, (22 Ala. 490,) the judge delivering the opinion of the court, declares that a majority of the court disapprove of *Jones v. Dawson*, so far as it overrules the 2d head-note of *Coopwood v. Wallace*, (12 Ala.) And the

opinion of *Mulhall v. Williams*, *supra*, recognizes the right of an administrator to employ counsel, and recognize the right of the counsel who has performed services for the estate, to have the estate charged in equity with the payment of his fees.—See *Mulhall v. Williams*, 32 Ala. 491.

The case of *Nolly Young's Estate*, (3 Md. Ch. Dec. 461,) is cited in *Mulhall v. Williams*, and it sustains the view of the court.

In *Lyon v. Hays, Adm'r*, (30 Ala. p. 431,) Judge Walker says, "*it may be that an administrator who has contracted a liability, within the scope of his official authority, has an equitable right to retain out of the assets an amount sufficient to satisfy that liability; and that that right is one of which the creditor, who has rendered services to the estate, may avail himself in equity, after exhausting his remedy at law against the administrator.*"

The relief was denied in the case of *Lyon v. Hays, Adm'r*, *supra*, on the ground that the administrator had finally settled the estate and had been discharged on such settlement.

The case of *Baker v. Gregory and Wife*, settles that the trustee may charge the trust estate in equity.—28 Ala. 544.

In the case now at bar, the executrix had, by the terms of the will, the right to create debts and charges against the estate; she is still continuing as the executrix of the estate, never having settled the estate. All the authorities agree that she can reimburse herself out of the assets of the estate for such services as the complainant performed, and for the mules purchased for the use and benefit of the estate. This right of the executrix still continuing, the creditor has the right in equity to claim *what* she would be entitled to, it being shown that she has been sued to insolvency.

The case of *Pollard et al. v. Cleveland*, (manuscript opinion of Chief-Justice PECK, Jan. term, 1869,) is not inconsistent with the right of the complainant in this case. In that opinion, he recognizes exceptions to the general rule, and indicates what such exceptions may be. The case at bar is within the exception.—See, in support of this view, the case of *Dyet v. Coal Co.*, 20 Wend. 570.



The case of *Cater v. Eveleigh*, (4 Des. S. C. Eq. R. 19,) is directly *in point*, as far as the principle of this case is concerned.

We submit, that the reason given in the case of *Jones v. Dawson*, *supra*, and in the English cases cited in that opinion, why the trust estate can not be reached in equity in the *first* instance, is not well founded. The reason given is, that a multiplicity of suits might be brought against the trust estate—one by every person who had credited the trustee on the faith of the trust estate. We submit that this reason would apply to every case of a person who contracts debts and fails to pay them. But it is not necessary in our case to controvert the authority of the case of *Jones v. Dawson*; for we say that ours is a case within one of the well-settled exceptions to the general rule.

PETERS, J.—The facts in this case are almost identically the same as those in *Lyon v. Hays' Adm'r*, 30 Ala. 430. In this latter case Lyon filed his bill to coerce payment of a debt due him out of the estate of George Hays, deceased, for services rendered by him, at the instance of Robert Leachman, a former administrator *cum testamento annexo*, in ditching the lands of the estate. The bill alleged, the services rendered were valuable to the estate, and that the complainant had obtained judgment at law against Leachman, on which execution had been issued and returned “no property found”; and also that Leachman had made final settlement of his administration, and had been removed from office. This bill was held to be without equity. In delivering the opinion in this case, this court say, “we concur in the opinion expressed by the chancellor, that the complainant’s bill contains no equity. According to the decision in *Jones v. Dawson*, 19 Ala. 872, which we are not willing to overrule, one rendering services to a trust estate, under the employment of the trustee, has no redress against the trust, except to subject an equitable demand of the trustee to the payment of the debt.”

Here the appellant, Wade, charges in his bill, that Mrs. Pope, the appellee, was appointed by her husband at his death, executrix of his will; that the will gave her, as such

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executrix, power to carry on the farm and manage it as the husband did in his life time ; that Mrs. Pope qualified as such executrix, and managed said farm under said will ; that her testator's estate consisted of "lands, slaves and stock ;" that in the year 1856, Mrs. Pope, as executrix, had employed him, said Wade, as overseer on said farm, and had procured him, at her request, to purchase for the use of said plantation certain mules at the price of seven hundred and fifty dollars, which mules were used and worked on said plantation, and that they had been retained by executrix as the property of said estate ; that appellant had sued Mrs. Pope, not as executrix, but in her individual name, in the circuit court of Montgomery county in this State, for his wages and the price of said mules, in which suit he recovered judgment against her in April, 1869, for the sum of \$1400,00, damages, and the further sum of \$503,65, costs of suit, on which judgment execution had been issued and returned "no property found." This judgment is against Mrs. Pope in her individual capacity, and not against her as executrix. It is really her debt and not the debt of the estate she represents. And the plaintiff can not go into chancery and change it from a liability against her to one against the estate of her testator. Such is the attempt here, and it is forbidden by the uniform decisions of this court for many years.—*Jones v. Dawson*, 19 Ala. 672 ; *Kerman v. Benham*, 28 Ala. 501 ; *Lyon v. Hays*, 30 Ala. 430 ; *Mulhall v. Williams*, 32 Ala. 489.

The executrix is a trustee, and if the will gives her authority to contract debts for expenses incident to the management of the estate she represents, then she is liable at law for such debts, as such executrix.

The decree of the chancellor dismissing the bill in the court below is affirmed at the costs of the appellant and his securities in this court and the court below.

NOTE BY REPORTER.—At a subsequent day of June term, 1869, a rehearing was asked by appellants ; to which the following response was made at the present term.

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State ex rel. v. Falconer.

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PETERS, J.—The rehearing in this case is refused. It is based upon the authority of *Coopwood v. Wallace*, 12 Ala. 790. This was a special case, and has since been very much doubted.—*Jones v. Dawson*, 19 Ala. 672. If the executrix had authority under the will to bind the estate, then the estate was bound at law, and there was no need for a resort to equity, if she had not such authority to bind the estate, then she alone was liable.

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### STATE EX REL. vs. FALCONER.

[INFORMATION IN THE NATURE OF QUO WARRANTO.]

1. *Office; failure to do what, does not vacate ipso facto.*—The failure of an officer to file his bond within the time prescribed by law, does not *ipso facto* vacate his office.
2. *Commissioners court; what has not jurisdiction of.*—The commissioners court has no jurisdiction to declare the office of tax collector vacant. Its appointment of a person to the office, when there was no vacancy, is void.
3. *Act approved October 8th, 1868; what waived.*—The act of the legislature, approved October 8th, 1868, extending the time within which tax collectors should file their official bonds, was a waiver of the right of the State to claim a forfeiture of office against those who had not at that time given bond.
4. *Mandamus and quo warranto; when concurrent remedies.*—*Mandamus* and *quo warranto* are sometimes concurrent remedies to try the right of contending parties to an office.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The opinion states the facts.

WALKER, MURPHEY & WINTER, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

B. F. SAFFOLD, J.—At the election for State and county officers, held in February, 1868, William Falconer



was elected tax collector of Montgomery county. On the 2d of October, 1868, he not having offered his official bond, the commissioners' court of Montgomery county entered on its minutes the following order: "Ordered, that the office of tax collector be, and the same is hereby declared vacant, and that the court do now proceed to fill the vacancy by appointment; whereupon George F. Stewart was appointed county tax collector."

On the 15th of October, 1868, Falconer tendered to the probate judge a bond, which he declined to approve on the ground that he was not then entitled to the office. Stewart having declined to accept, the appellant was appointed in his stead by the commissioners' court, on the 6th of November, 1868. Falconer's bond was approved August 5th, 1869, under a *mandamus* from this court, and he, thereupon, assumed the duties of the office. The present proceeding is an inquiry by writ of *quo warranto* into his right to do so.

At the time the commissioners court declared the office of tax collector vacant, and appointed Stewart, the time prescribed within which Falconer was to make his bond, had expired. Cause of forfeiture existed, but no declaration to that effect had been made by a tribunal competent for the purpose, when the legislature passed an act extending the time within which these officers might make and file their bonds.—Acts 1868, p. 218. Before the expiration of this extended time the appellee offered a suitable bond.

It has been decided by this court that the failure of an officer to file his bond within the time prescribed by law, does not *ipso facto* vacate his office.—*Sprowl v. Lawrence*, 33 Ala. 674.

The commissioners court has authority to fill a vacancy in the office of tax collector, but it has no jurisdiction to declare a vacancy.—*State ex rel. v. Ely, Judge, &c.*, 43 Ala. Being a court of limited jurisdiction, its order appointing Stewart is void on its face. No statement of how, or why there was a vacancy is made. An order declaring the office vacant was made, which was wholly unauthorized

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and extra judicial, as a judgment or inquisition of office.—*Hill v. The State*, 1 Ala. 559.

I am aware that there is high authority for the proposition, insisted on by the counsel for the appellant, when this case was before this court in the form of *The State ex rel. v. Ely, Judge, &c.*, 43 Ala. 568, that when a person has obtained possession of an office, under color of right, a *mandamus* will not lie to install another, but the incumbent must be removed by a proceeding *quo warranto*; the practice, however, has not been established in this State to that extent. An examination, either way, would probably indicate the result of the other, but I do not see how it could dispense with it entirely.—*People v. Kilduff*, 15 Ill. 492; *Street v. County Commissioners*, Breese, 25; *People v. Head*, 25 Ill. 325.

The judgment is affirmed.

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### HUGHES vs. HUGHES.

[BILL IN EQUITY FOR DIVORCE.]

1. *Matrimony, dissolution of bonds of, under section 2353 of Revised Code; what necessary to authorize.*—To authorize a dissolution of the bonds of matrimony under section 2353 of the Revised Code, there must be, on the part of the husband, actual violence committed on the person of the wife, attended with danger to her life or health, or such conduct on his part as shows there is reasonable apprehension of such violence; and such acts of violence, or such conduct, should be distinctly stated and clearly proved, so as to leave no reasonable doubts on the mind as to the truth of their existence, and of their tendency to endanger the life or health of the wife; and the wife, as a general rule, should be without fault on her part.
2. *Evidence; what insufficient to establish charge of cruel treatment and violence.*—The deposition of one witness, the sister of complainant, whose general character is proved to be bad, and who is contradicted as to a material fact by the brother of the defendant, is not sufficient to establish the charge of cruel treatment and violence, committed on the person of the wife, by the husband.

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3. *Defendant's answer; for what purpose can not be looked to.*—The answer of the defendant, in such a case, can not be looked to, either to support the charges in the bill, or to sustain the deposition of a witness whose general character is shown to be bad.
4. *Absent witness. admissions of what would swear if present; force and effect of.*—Admissions, of what it is stated absent witnesses will swear, made by the plaintiff's solicitor to obtain a hearing and prevent a continuance, must be held to have the same force as the deposition of such witnesses would be entitled to have if regularly taken by the defendant.
5. *Next friend; when may be taxed with costs.*—A next friend, in whose name the bill of a wife is filed to obtain a divorce, if it be dismissed, may properly be decreed to pay the cost.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. A. C. FELDER.

The facts are sufficiently stated in the opinion.

WALKER & MURPHEY, for appellant.

FALKNER & MOLTON, *contra*.

PECK, C. J.—To authorize a dissolution of the bonds of matrimony, under section 2353, there must be, on the part of the husband, actual violence committed on the person of the wife, attended with danger to her life or health, or such conduct on his part as shows there is reasonable apprehension of such violence; and such acts of violence, or such conduct, should be distinctly stated, and clearly proved, so as to leave no reasonable doubt on the mind as to the truth of their existence, and of their tendency to endanger the life, or health of the wife; and, besides, the wife should be, as a general rule, without fault on her part.

These parties were married on the 12th of January, in the year 1869, and lived together as husband and wife until the 16th day of the next March, three months and four days, when plaintiff, as she states, from fears existing in her mind of great personal violence, by the threatening conduct of defendant, was induced to leave him to secure her personal safety.

She does not state what was the character of the threatening conduct of defendant, and, consequently, no suffi-



cient reasons are disclosed to justify the plaintiff in the course she pursued in leaving her husband.

The first serious fault, therefore, as far as appears, lies at her door, and this may have had more or less influence in leading the defendant into the improper conduct, on his part, that is charged to have followed.

After the abandonment of her husband, the plaintiff states that she lived in perpetual fear and dread that he would find her, and do her great bodily harm, and for this reason she endeavored to keep the place of her residence unknown to him, that her safety might be more perfect ; that at length he discovered where she was living, and on the 22d day of April, 1869, he came to her room, and in an angry tone and excited manner, said to her, "you must go with me and live with me ;" that she, in a mild manner, replied : "I am afraid to live with you ;" that he then, using profane language, said, "I will whip you," and, with an open knife in his hand, seized her by the arm, and brandished his knife about her head and throat, and looking like one infuriated, said : "I will cut your throat if you do not come and live with me—make up your mind to die, I will certainly kill you ;" with other threats of great personal violence.

This, the plaintiff states, took place in the presence of her sister, who threatened to call for the police, and opened the door for that purpose, when defendant closed his knife and left the room ; that he came the next day, and threatened to whip her.

She further charges that defendant had committed actual violence on her person, attended with danger to her life, and had been guilty of conduct towards her, from which there was reasonable apprehension of violence to her person, attended with danger to her life, but no other specific acts of violence are stated.

The defendant, in his answer, denies that the plaintiff has any reasons to apprehend violence from him. He says he admits most of the statements made in the fourth paragraph of the bill, the paragraph in which the threatening conduct, on his part, is charged, with the brandishing of his knife, &c., but says the threats were not intended to be

carried into effect, and that plaintiff knew it. He further states, that after his wife had left him, he was disposed to let her obtain a divorce, as she was desirous of doing so, but she had been advised she could not do it unless he used actual violence towards her, and for that purpose it was agreed between them that he should go to her house and act in such a way that she might sue for and obtain a divorce; that, afterwards, he ascertained she was guilty of improprieties with other men, and, thereupon, he determined not to carry out their agreement, and let her get a divorce.

The only witness that swears to any acts of violence, on the part of the defendant, is the plaintiff's sister, Bettie Dixon. Her account of defendant's conduct is as follows: "About the 1st of March, 1869, the complainant came to my house and stated that her husband had treated her badly, and that she was afraid to live with him in the country. About a week afterwards defendant came to my house; the first I saw of him he was in complainant's room; at that time there were a few cross words between them. A few days after that, he came to my house again, and in my presence he drew his open knife upon complainant, and, with his hand on her shoulder, threatened to kill her. I then told him that I would call the police. He then sat down; he several times repeated the threats in my presence."

A witness by the name of Matilda Smith, also examined by plaintiff, says, she was at the plaintiff's room, about the twenty-third of March, 1869; that defendant came there, but she did not know what his business was.

He asked complainant if she was not going to do what he wanted her to do. She told him she was not. He then told her he would make her do it. She said to him, if you can make me do it you had better try it. He then said, "damn you, I will do it." He then left the house. His manner was rude and angry.

The foregoing is all the material evidence in the record, as to the improper and cruel treatment of plaintiff by defendant; all of which took place after plaintiff, without any sufficient reasons therefor, as far as appears, abandoned the house and home of her husband.

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After the answer was filed and evidence taken, the defendant, by leave of the court, filed a supplemental answer, in which he states that, after his original answer was filed, there had been forgiveness on the part of plaintiff, and that she had admitted him to conjugal embraces, and that plaintiff and defendant had cohabited together as husband and wife.

The truth of this supplemental answer is substantially sustained by the deposition of defendant's brother, and as strongly denied in the deposition of said Bettie Dixon, plaintiff's sister, on a re-examination.

When the cause was called for a hearing, the defendant moved the court for a continuance, to enable him to take the depositions of several witnesses by whom, he said, he could prove that said Bettie Dixon had stated she would not, if she could avoid it, testify on the subject of the reconciliation of plaintiff and defendant, and of their cohabiting together, &c., but, that if the person got her, who was appointed to take her testimony, and did examine her, she would tell the truth, and testify that complainant and defendant did sleep together, on a certain night, about the first of October, 1869, when defendant and his brother staid all night at complainant's house; and further, defendant stated he could prove, by said witnesses, that they were acquainted with the general character of said Bettie Dixon, and that her general character was bad.

To prevent a continuance, the plaintiff's solicitor admitted the witnesses, if examined, would testify as stated by defendant.

The cause was, thereupon, heard on the bill, answers, depositions, and the admissions of the plaintiff's solicitor, as to the matters the unexamined witnesses would testify to; and the chancellor dismissed the plaintiff's bill of complaint, and decreed the costs to be paid by her next friend. The case is here, on the plaintiff's appeal; and dismissing the bill, and decreeing the costs against her next friend, are assigned for errors.

A careful examination and consideration of this whole case, satisfies me, that the chancellor rightly dismissed the plaintiff's bill of complaint,



She is herself, manifestly, not any more amiable than she should be. She leaves her husband, as far as the evidence shows, without his consent or knowledge, and without any justifiable cause for such an important and serious step in her life; and when she is requested by him to return, and live with him—for that is no doubt what he intended, and what she understood, when he asked her if she was not going to do what he wanted her to do—her own witness, Matilda Smith, says she told him she was not, and on his saying he would make her do it, instead of remaining silent, or giving a gentle answer that might have allayed his excited feelings, she tauntingly tells him, “if you can make me do it, you had better try it.” If she is what she claims to be, an injured wife, this, to say the least of it, was an unwise and indiscreet answer for her to make.

If there is any one state and condition in life in which the apostolic precept should have its proper influence, it is that of husband and wife—“Bear ye one another’s burdens, and so fulfill the law of Christ.” But this, it is to be feared, is too seldom done now-a-days.

The present age is wonderfully demoralized on the subject of marriage and divorce. It seems to be forgotten, that marriage is a divine institution, and, therefore, imposes upon parties higher moral and religious obligations than those imposed by any mere human institution or government.

But, all this aside, the evidence of the plaintiff is of too uncertain and doubtful a character to sustain the charges of improper and cruel treatment on the part of the defendant, made against him in her bill of complaint. Her sister, the said Bettie Dixon, is the only witness that speaks of any real acts of violence, or seriously threatened violence, by the defendant to the plaintiff, and the evidence of this witness, when considered in connection with the deposition of defendant’s brother in relation to the reconciliation of the parties, and the admissions of what the witnesses not examined would swear, is wholly insufficient, by itself, to authorize a decree dissolving the bonds of matrimony existing between these parties. The evidence of plaintiff’s sister and of defendant’s brother, owing to their relations

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to the parties, and the conflict in their statements, can not be considered free from suspicion.

The admissions of what the witnesses, not examined, would state, must be held to have the same force as though sworn to by them, in depositions duly taken by the defendant. This being so, the case stands thus: The only witness whose evidence is relied upon to sustain the charges made in the bill, is, in the first place, a witness of general bad character; 2d, she stated that if examined, she would swear to a certain fact, which, when afterwards examined, she denied; and, 3d, her evidence, as to a material fact, is contradicted by the evidence of defendant's brother. This leaves the plaintiff's case without support, except from the evidence of a single witness of general bad character, and whose evidence is otherwise seriously impeached.

6. The plaintiff's case can derive no support from the admissions in the defendant's answer. For reasons of public policy, as well as by positive enactment, (Revised Code, § 2355,) the answer of a defendant in such a case, whether sworn to or not, is not permitted to be used as evidence for or against either party. But if these objections did not exist, the admissions in the answer, on the same subject, would have to be taken altogether, and then they show that the pretended violence charged was, as to these parties, no evidence at all, but was a fraudulent device, resorted to by them to deceive the court, and to enable the plaintiff to accomplish an unlawful purpose. This, if true, ought to dismiss the plaintiff's bill out of court.

Upon the whole, we are satisfied the plaintiff's complaint is without merits, and that the chancellor's decree ought to be affirmed, both in dismissing her bill of complaint and in decreeing the cost against her next friend.

The decree of the chancellor is affirmed, and the plaintiff's next friend, the said John Maxey, will pay the costs of this court and of the court below.

BOYD ET AL. *vs.* HUNTER.

[BILL IN EQUITY BY WIDOW, AFTER ALLOTMENT OF DOWER, AGAINST HUSBAND'S ADMINISTRATORS AND THEIR TENANTS, TO RECOVER RENTS OF LANDS LEASED BY HUSBAND BEFORE THE MARRIAGE AND HIS DEATH, AND AFTERWARDS LEASED BEFORE ALLOTMENT OF DOWER BY ADMINISTRATORS.]

1. *Bill in chancery ; what, not without equity.*—A bill in chancery by the widow to recover the rents of her dower interest from the death of the husband to the assignment of her dower, is not objectionable for want of equity.
2. *Same ; what not multifarious.*—It is not multifarious, because a demand for the rents derived from a lease made by the husband is joined with a claim for rents against the administrators personally, accrued before and after the allotment of dower.
3. *Same ; in what suit, heirs of decedent, are not necessary parties defendant.*—The heirs at law of the decedent are not necessary parties defendant with the administrators, to a suit against the latter by the widow for the rents of her dower interest after its assignment.
4. *Same ; what not misjoinder of parties.*—Nor is it a misjoinder of parties to unite the tenants of the administrators with them as defendants.
5. *Same ; when equity will settle matters of account which are enforceable at law.*—The jurisdiction of equity having attached, that court will complete justice between the parties by settling an account for rent due by the tenants, up to the termination of the defendant's possession, although such rents might be recovered at law.
6. *Administrators, how liable for rents to dowress.*—The administrators, in this case, are liable as such for the rents accrued under the husband's lease, and personally for those arising under the lease made by them.
7. *Administrators' tenants of ; how liable to dowress for rents.*—The tenants of the administrators are liable to the dowress for the rents not paid by them at the date of the assignment of dower, and for such as may afterwards accrue during the continuance of their possession.
8. *Estate for years ; how effects a title of dower.*—An estate for years interposes no impediment to a title of dower, and if rents be reserved to the use of the husband the widow is entitled, upon endowment, to a proportionate part of such rent.

APPEAL from Chancery Court of Dallas.  
Heard before Hon. W. B. WOODS.

The facts upon which the decision is based are sufficiently stated in the opinion.



WATTS & TROY, and W. E. BOYD, for appellants.—There was no equity against Boyd and Milhouse, as administrators of Hunter, because complainant was not entitled, *as dower*, to any portion of the rent for 1866.

Jno. S. Hunter, *before his marriage with complainant*, had leased the lands for *one year*. He had conveyed his present estate in the lands, and only had an estate in reversion after the termination of the lease, *at the time of his marriage*; and during the *coverture* he continued to have *only* an estate in reversion.

This lease, made before marriage, was binding on the subsequent wife, and on the death of the husband the surviving wife became dowerable only of the estate in reversion, and took that subject to the lease made before the marriage.

See Scribner on Dower, 1 vol., p. 567, § 22. The *note* taken for the use of the real and personal property was not *real* estate, of which the wife was dowerable. If she was entitled to any portion of the proceeds of this note, she was entitled to it by virtue of the statute of distributors, *as of personal property* belonging to her husband's estate. Equity had no jurisdiction over this, on the facts stated in this bill. Boyd and Milhouse were not liable to her for the rents of 1867. They did not occupy or use the lands of which she was dowerable. She had her dower assigned in these lands in the early part of 1867, and whoever occupied the parts assigned to her was responsible to her for rent or use and occupation, and for this she had a complete remedy at law. She could, therefore, have sued S. Hunter and Riggs at law for the rent of that portion of her dower interest. She had a complete remedy against them, and none against Boyd and Milhouse for the year 1867.

Hunter and Riggs could, therefore, have legally paid to her the rent of her dower lands, and Boyd and Milhouse had no right to collect of them the rent.—See *English v. Key*, *supra*.

The bill was multifarious, even if it contained equity, because there was no propriety in making Boyd and Mil-

house parties in both their individual and representative capacities.—See Story Eq. Pl.

Boyd and Milhouse had no connection with Hunter and Riggs in any liability for the rent of her dower land in 1867, and for these two reasons the bill was multifarious as to them.

It was multifarious, because, if Boyd and Milhouse were proper parties and liable in equity to complainant, still there was no equity as to S. Hunter and Riggs, and they should not have been joined as defendants to the bill.

The rents of 1866 and 1867 were, as presented in this bill, *separate* and *distinct* matters, which had no connection with each other.

There was no *joint* liability between Boyd and Milhouse, and Hunter and Riggs, as to the rents of her dower lands for 1867, and Hunter and Riggs were certainly not liable in any aspect of the case for the rents of 1866. The account of the rents for 1866 could have been taken without any reference to those of 1867; they were not at all connected with each other.

The bill is therefore multifarious, by joining parties wholly unconnected with each other, and because separate and distinct matters, wholly disconnected, are joined in the same bill.—See *Bean v. Bean's Adm'r.*, 37 Ala. 17; *Mecham v. Williams*, 9 Ala. 841; *Colburn v. Broughton*, 9 Ala. 351; *McIntosh v. Alexander*, 16 Ala. 87, and authorities therein cited; *Felder v. Davis*, 17 Ala. 418.

The bill ought to have been dismissed for non-joinder of the heirs of John S. Hunter, *if the widow was entitled to any share of the rents of 1866, as dower.*

Now, the rent for 1866 was either *personal* assets of the estate of J. S. Hunter, or it constituted a part of his *real estate*. If it, by reason of the lease to McArthur & Co., before his marriage with complainant, had become severed from the *realty*, and thus become a part of his *personal* assets, in the hands of his administrators, then, it is too clear for argument, that the only claim the widow could have to any share of these rents, was as a distributee in the estate, under the statutes of Alabama, and she was not entitled to any share of it as dower.

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If, on the other hand, the rent for 1866 was still to be considered as a part of J. S. Hunter's real estate, so as to entitle his widow to a share of it as dower, then it is equally clear that no decree could legally be made, allowing her a share of it as dower, without having the heirs of J. S. Hunter before the court. If this rent was *realty*, it belonged to the heirs, subject to the widow's dower, and not to the personal representatives, Boyd and Milhouse; and Boyd and Millhouse did not and could not represent legally the heirs of J. S. Hunter as to any portion of the realty belonging to his estate. The rights of the heirs can never be legally divested, unless they are before the court.—See *Kennedy v. Kennedy*, 2 Ala. 573; *Bondurant v. Sibley's Heirs*, 37 Ala. 565; *Batre v. Auze*, 5 Ala. 173; *Jennings v. Jenhus*, 9 Ala. 286.

In this aspect of the case, the failure to make the heirs of J. S. Hunter parties defendant, was a fatal defect to the bill.—See *Kennedy v. Kennedy*, 2 Ala. 573; *Batre v. Auze*, 5 Ala. 173; *Phillips v. Threadgill*, 37 Ala. 93; *Gould v. Hays*, 19 Ala. 435; *Moore v. Murrah*, 40 Ala. 573.

The decree (joint decree) requiring Wm. E. Boyd and Franklin S. Milhouse, in their individual and personal capacity, to pay the rent for 1867, cannot be sustained. If they were liable at all for the rent of 1867, they were liable in their *representative* character. There is nothing in the proof to make them liable personally.

After her assignment of dower, if Hunter and Riggs did not rent *subject to her dower*, Boyd and Milhouse could not have legally recovered of Hunter and Riggs the part of the rent due to her. They could have successfully defended against a suit brought by Boyd and Milhouse to the extent of her right.—See *English v. Key*, 39 Ala., *supra*.

But, although Mrs. Hunter may be entitled to one-third of the rents after the termination of the lease to McArthur & Co., until the actual assignment of her dower, from 1st January to 1st April, 1867, yet out of whom must she obtain this rent? She cannot make Boyd and Milhouse liable for it, either in their representative capacity, or in their individual capacity, unless they occupied the lands, or collected the rents, before the commencement of



this suit. She can only look to the persons who occupied the lands assigned her as dower.

The proof very strongly shows that she could have rented her dower lands, after they were assigned to her, on quite as good terms as at an earlier time of the year ; and this is proven by her own witnesses.

But, going back to the point as to whether Mrs. Hunter is entitled to a part of the rent of 1866 as dower ; let us examine a little further her right in this respect. We know that the old books hold that rents savor of the realty, and that widows are entitled to a share of them as dower. And if a man made a lease of his lands for years, reserving rent, and afterwards take wife, and then die, the wife surviving (it is said in the old books) shall be dowable of the lands so leased, after the termination of the lease, and also of the rents, from the death of the husband.

Why was it so held in the old books ? Under the feudal system, rents were paid in kind of the products of the soil. The rents *reserved*, under a lease for a term of years, were to be paid in the products of the soil, as they were annually made ; and hence they were said to savor of the realty, and in some respects to be considered as realty. They descended to the heir, and not to the personal representative of the intestate, and the widow was said to be dowable of them as of the realty.

But with the change of times, new kind of leases are made. When rents are payable in money, or where a separate note or bill is taken for the rent, under a lease for years, and the suit is not merely reserved, in the contract of lease, then, in all such cases, the rents are severed from the realty, and become personal assets, which go to the personal representative, and not to the heirs on the death of the intestate.—Williams on Executors, on top page, 696, marg. p. 697. He uses this language : “If the rent be *reserved for years*, and be *severed* from the reversion, it may then go to the executor or administrator, although the reversion goes to the heir.”

This lease to J. McArthur & Co., was made before the marriage of Mrs. Hunter to John S. Hunter, and a promissory note, providing for the payment of \$11,000 00 for

the use of the lands and personal property ; the note was in his possession at the time of his death. This note was separate from the deed of lease, in which rent is reserved for two more years if the lessees choose to hold under it. Now, is not the very act of taking the promissory note for the rent of 1866, a severance of the rent from the realty ? Does not this note go to the administrators of Hunter, and not to his heirs ? This rent note did not become due until after the death of Hunter. If it had become due before his death, it is clear on all the authorities, that as between the heirs and the personal representatives, the note would have gone to the personal representative.

Now, if this note descended to the heirs, (and it is only in this court that the widow can be dowable of any part of it,) then, how could she have a right to come into a court of equity to recover any part of it from the administrators, who have collected it since it matured ? Why could she not recover it in a suit at law, as for money had and received by Boyd and Milhouse to her use ? When one person has money in his possession, which, *ex equo et bono*, belongs to another, the latter has a full and complete remedy at law for its recovery.—See *Hitchcock v. Lukins*, 8 Porter, 333. If this be true, then the bill is without equity, as to the rents of 1866.

Suppose John S. Hunter had received this rent for 1866 in advance, and had this identical money in hand at his death, could the widow be dowable of the money ? The money would be the representative of the rent of the land. Is it not clear that the reception of the money, although it remained in hand at his death, was a severance of the rent from the realty, and be considered as personal assets in the hands of the administrators ? Could the heirs have laid any claim to it as against the executors ? It seems to us clear, that it would have belonged to the administrators. Now, when a promissory note, or bill of exchange, is taken for the rent, is not this as much a severance from the realty as the taking of bank bills—money ?

But whatever may have been the doctrine of the common law as to the right of the widow to dower, we insist that the statutes of Alabama must govern, and that under these

statutes and our decisions, the widow is not entitled to *dower in rents*. All that she can possibly recover is *mesne profits*, as damages from the time of her husband's death to the time of actual assignment of dower, in the hands to which she is entitled as dowress. Her right to *mesne profits* as damages can only be allowed from the time her right to dower accrues, to the time of the assignment by metes and bounds.—See *Beavers & Jamison v. Smith*, 11 Ala. 32; *Smith v. Smith*, 13 Ala. 329; *Slater v. Meek and Wife*, 35 Ala. 528. These cases very clearly show that whilst Mrs. Hunter may be entitled to damages as *mesne profits*, from the 1st of January, 1867, to the 1st of April, 1867, the time when her dower was assigned, she is not entitled, in equity, to any rent after the assignment; and, she is only entitled to this against Boyd and Milhouse in their representative capacity, after they have received the rents.

BROOKS, HARALSON & ROY, *contra*.—1. Where a widow brings a suit at law she may, after a recovery there proceed in equity for an account of the rents and profits.—*Turner v. Morris*, 27 Miss. 733; 1 Story's Eq. § 512.

2. The widow is entitled to one-third of the rents due under the contract made by the intestate, in his life-time, with McArthur & Co. "If the lands of which the widow is dowable, be subject to a demise for years created by the husband previous to the marriage, upon which rent is reserved, his widow will be entitled to recover a third part of the reversion, and a like proportion of the rent and damages."—2 Scribner on Dower, § 6, p. 660. In 1 Scribner on Dower, § 12, p. 222, it is said, "if rent be reserved to the husband, upon the intervening estate, the widow is entitled upon endowment to a proportionate part of such rent;" and at section 6, p. 361, of the same, it is held "that an estate for years, whether created before or after marriage, interposes no obstacle to a claim of dower. In every such case the wife is entitled to be endowed of the reversion in fee, and also of a proportionate part of the rent, as incident to the reversion. If the husband make a lease for years, reserving a rent, and taketh a wife, the husband



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dieth, the wife shall be endowed of a third part of the reversion by metes and bounds, together with a third part of the rent." \* \* \* And in Lomax's Digest of the law of real property, §§ 1, 2, p. 97, it is held "that dower was due of mines of coal and lead, wrought during the coverture, \* \* \* by lessees for years, paying pecuniary rent or rents in kind, \* \* \* and that she is endowable of incorporeal hereditaments, as rents, commons, estovers, and the like." And in section 6, page 723, of the same volume, it is held "that if a husband make a lease for years, reserving rent, marries and dies, his wife shall be endowed of a third part of the reversion, together with a third part of the rent. And in 2 Scribner, *supra*, § 35, p. 672, it is held that "if the lands were leased for years, before the marriage, the widow will recover dower, not according to the value of the land, but according to the rent; and it follows that if the rent reserved is only a nominal one, no dowages, or none but such as are merely nominal, can be recovered."—See, also, *Chase's Case*, 1 Blonding's Ch. Rep. 206, 231.

3. The widow is entitled to recover in equity, as against the heirs or administrator, the rents or *mesne* profits accruing from the lands assigned her as dower, from the death of her husband to the time when her dower was allotted. *Slatter v. Meek and Wife*, 35 Ala. 528, 538, 539. This authority shows that the rents are recoverable by the widow from the time of the death of her husband. Such being the case, Mrs. Hunter is entitled to recover rent from the time of the death of her husband, to-wit, the 20th day of August, 1866.

4. The widow being entitled to a proportionate part of the rent, which accrued before the assignment of her dower, to-wit, from the 20th of August, 1866, to the 18th day of April, 1867, when the assignment was made, the only forum in which she could recover such rent is a court of chancery.—*Slatter v. Meek and Wife*, 35 Ala. 528-39; *Turner & Sharp v. Morris*, 27 Miss. Rep. 737; 1 Story's Eq. § 626; *Waters v. Williams*, 38 Ala. 680-84. It is true that the rents, which accrued after the assignment of dower, are recoverable at law; but, as the claim for rents which

accrued before the assignment of dower is of an equitable nature, this is a sufficient ground for the assistance of a court of equity, and, jurisdiction having been obtained for that purpose, it is proper to exercise it in settlement of the entire controversy, and thereby prevent multiplicity of suits. The case from 27 Miss., *supra*, is exactly in point; see, also, 1 Story's Eq. § 512. These authorities clearly show that the appellee is entitled in this suit to recover all the rents which accrued after the assignment of dower, although the same is a legal demand; for, where equity takes jurisdiction for one purpose, it will settle all the rights and equities between the parties.—1 Story's Eq. § 71.

5. But it is objected that the bill is multifarious, for the reason that it unites the defendants, Riggs and Hunter, who are liable only for the rent which accrued after the 1st day of January, 1867, with Boyd and Milhouse, who are liable for the rent which accrued from the death of the husband, 20th August, 1866. It is true that Riggs and Hunter are not liable for the rent which accrued in 1866, but it is insisted, that under the facts and circumstances in this case, the bill is not obnoxious to the objections made; for Boyd and Milhouse were, and are, liable in equity to the widow, not only for a just proportion of the rent, which accrued in 1866, but also for the rent which accrued up to the 18th of April, 1867, when the dower was assigned. The only forum in which the demand could be maintained is in a court of chancery, and against Boyd and Milhouse this demand is one and indivisible, and Riggs and Hunter being liable, also, in equity, for that portion of this demand which accrued from the 1st of January to the 18th of April, 1867; it is eminently proper, if this were the extent and limit of their liability, that they should be united with Boyd and Milhouse in the same suit, and the court having acquired jurisdiction for one purpose would embrace and settle, in the one suit, the demands for rent subsequently accruing, whether they are legal or equitable. This position, we maintain, is well supported by authority. A bill for partition which unites tenants, who have possession of

only a portion of the land, with a trustee who had possession of the entire tract, is not multifarious, the accounts being so connected that the one can not be taken without the other.—*Horton v. Sledge*, 29 Ala. 478 ; *Holstead v. Shepard*, 23 Ala. 568 ; *Kennedy v. Hamilton*, 2 Ala. 573 ; *Gaines and Wife v. Chew*, 2 How. U. S. Rep. 619, 641. In 2 Howard, *supra*, it is said—"that while the object of the rule against multifariousness is to protect the defendant against unnecessary expense, yet it would be a great perversion of the rule to impose upon the parties two or more suits instead of one." In this case the complainant has but one demand ; it is for dower rent ; the defendants are all interested in the demand, and their interests are all more or less connected with each other.—See, also, Story's Eq. Pl. §§ 533, 534, 539.

6. As to *misjoinder* of defendants, it is submitted that the authorities already cited upon the doctrine of multifariousness clearly shows that the objection is not well taken ; besides, a misjoinder of defendants is available only to the parties improperly brought in.—*Horton v. Sledge*, 29 Ala. p. 478.

7. A demurrer, for want of proper parties, must show the persons who are not, but ought to be, made parties.—*Chapman v. Hamilton*, 19 Ala. 221. The demurrer, for want of proper parties in this case, does not name the persons who are omitted, but is vague and uncertain ; so, also, the other grounds of demurrer assigned are too vague and uncertain to be considered by the court.

8. The position of the counsel for appellants, that Boyd and Williams are not responsible for the rent which accrued after the assignment of dower, can not be maintained. The principle decided in the case of *English v. Key*, (39 Ala. R. 113,) that a tenant is not bound to pay rent to the landlord, when he, the tenant, has been evicted under a paramount title, or when, since the inception of the lease, the title of the landlord has been extinguished, or has passed from him, either by his own act or by operation of law, does not exonerate Milhouse and Boyd from liability to pay rent which accrued after the assignment of dower in this case. It was the duty of Boyd and Williams to



assign dower to Mrs. Hunter without delay. This obligation they violated. Instead of performing this duty, they wantonly resisted her application for dower, and leased the lands to Riggs and Hunter for the year 1867. At the time they thus leased the lands, Mrs. Hunter, by virtue of her right to dower, was entitled to one-third of the rent of the premises. Instead of recognizing her right to an aliquot portion of the rent, they took the note for the rent, payable to themselves as administrators, and resisted her application for dower, and remained in possession of the premises by their tenants; and they and their tenants were and continued liable to her for her portion of the rents or damages, not by virtue of any thing which subsequently happened, but by virtue of a pre-existing right. And though Riggs and Hunter were not bound to pay Boyd and Milhouse the rent which accrued after the assignment of dower, upon the portion of land allotted to her, yet they, and Boyd and Milhouse, all remained justly bound to her for such rent.

If "A" is kept out of the possession of his premises for twelve months by an adverse holder, who for six months thereof remains in the actual possession thereof, and for the other six months puts the same in the possession of his tenants, it can not be denied that the adverse holder, as well as his tenants, are liable to "A" in damages for the detention of the land by the tenants, even though the tenants should cease to be bound for the rent to their landlord.

In this case, the tenants were not evicted — neither did they attorn to Mrs. Hunter; but they held and enjoyed the entire premises under the lease by Boyd and Milhouse, who elected to consider the contract as still existing. In fact, Milhouse and Boyd held Riggs and Hunter bound to them for all the rent, and the latter at no time repudiated the contract, or insisted upon a failure of consideration, but recognized their liability to pay them the entire rent stipulated for in the contract. They all act in concert and are all liable to the complainant.

The liability of Boyd and Milhouse is entirely personal, from beginning to end. They were, and are, personally liable to Mrs. Hunter in equity for her portion of the rent

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collected by them from McArthur & Co.; they were, and are, personally liable to her in equity for the rent which accrued from the 1st day of January, 1867, up to the time of the assignment of dower; and so, also, of the rent which accrued afterward. For no portion of this rent are they liable in their representative capacity.

9. At the time of the commencement of this suit, Milhouse and Boyd being liable to Mrs. Hunter for all the rent which had accrued up to the assignment of dower, and Riggs and Hunter being also liable for a portion thereof, Mrs. Hunter has clearly the right to bring and maintain this suit for the recovery of the same, and is entitled to recover in the same suit all the rents which subsequently accrued. The plaintiff, even in an action of ejectment at law, is entitled to recover all the rents which have accrued up to the time of trial. The idea that a court of chancery would, in such a case, afford a remedy less complete than a court of law, is contrary to all principle and authority. It must be borne in mind, that this is not a suit for the enforcement of a contract between Boyd and Milhouse, and Riggs and Hunter; on the contrary, this is a suit to recover the rent or damages to which complainant is entitled as dowress—the right of action to recover a part of which had accrued before the commencement of this suit, and could only be enforced in a court of equity; which having taken jurisdiction for one purpose, will, to avoid multiplicity of suits, compel the defendants to account for all the rents for which they are accountable, whether the same accrued before or since the commencement of the suit.

10. The demurrer, for not having made the heirs of Hunter parties to the suit, was properly overruled for two reasons :

First.—The names of the heirs are not shown in the demurrer.—19 Ala. 121.

Second.—The right of the complainant to dower having been established by a decree of the probate court, in a proceeding to which the heirs of the intestate were made parties, and the administrators, and not being entitled to the rent which accrued in 1866 and in 1867, as against the

heirs, they (the heirs) are clearly neither necessary nor proper parties to this suit.

The administrators having received and being accountable for rents to which the widow is entitled, they must be considered as personally holding for her.—35 Ala. 501; 30 Ala. 132.

11. “Dower is a legal, equitable and moral right, favored in a high degree by the law, and, next to life and liberty, held sacred.—*Perrine’s Ex’r v. Perrine*, 35 Ala. 647. And we trust that, in the exercise of a sound discretion, the courts of justice will not permit the wiley defendants to render it nugatory, or impair its value.

B. F. SAFFOLD, J.—The appellee, the widow of John S. Hunter, deceased, filed her bill against his administrators and the other appellants, who were in possession, to recover the rents of her dower interest. She was married on the 15th of January, 1866, and her husband died on the 30th of August, following. On the 14th of November preceding the marriage, Hunter rented his lands to McArthur & Co., for the year 1866, they paying part cash and giving their note for the remainder, due January 1st, 1867. At the close of that year, Boyd and Milhouse, the administrators, rented the same lands for 1867, to Thomas Riggs and Starke Hunter, and took their notes for the rent due January 1st, 1868. The appellant’s dower in these lands was assigned to her on the 15th April, 1867. The bill was filed October 18th, 1867, and made the administrators, in their representative capacity and personally, and Riggs and Starke Hunter individually, as tenants, parties defendant.

This bill was demurred to by all of the defendants—1st, for want of equity; 2d, multifariousness; 3d, misjoinder of parties defendant; 4th, non-joinder of parties defendant; 5th, because the debt claimed was not due. The demurrer was overruled. At the final hearing on the pleadings and proof, the chancellor decreed the relief prayed for, confirmed the report of the register without objection, and rendered judgment against the administrators for the rent of the dower land from the death of the decedent to the 1st of January, 1867, and against them individually, and



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against Riggs and Hunter for the rents of 1867, and charged the costs against the estate.

For the errors alleged in this decree the appeal was taken.

The appellee, having procured the assignment of her dower in the probate court, sought in equity the recovery of the rents from the death of her husband to the date of the assignment. Of her right to do so there can be no question in this State.—*Slatter v. Meek, and Wife*, 35 Ala. 528; *McAllister's Exr's v. McAllister*, 37 Ala. 484; *Perrine's Exr's, v. Perine*, 35 Ala. 644; *Waters v. Williams*, 38 Ala. 680. The widow's right to have dower assigned to her is not a legal right in the land, nor in any portion of it; and hence, on the mere strength of her right to be endowed she could maintain no action at law to recover the possession, nor for the rents and profits.—*Cook & Hardy v. Webb*, 18 Ala. 814; *Inge v. Murphy*, 14 Ala. 289; *Waters v. Williams*, 38 Ala. 680.

The non-joinder of the heirs-at-law of Jno. S. Hunter, as parties defendant, was not a material objection. The dower had been allotted, and the rents had been received by the administrators; the heirs could not have recovered it from them.—*McLaughlin v. Goodwin*, 23 Ala. 846.

If Riggs and Hunter were improperly joined with the other defendants, they only could take advantage of it. *Horton v. Sledge*, 29 Ala. 478. The consideration of whether they could do so or not, is so involved with the objection of multifariousness, that we will examine them together.

To prevent multiplicity of suits, courts of equity sometimes entertain bills by complainants between whom there exists no privity of contract, and against defendants between whom exists no connection whatever, except a community of interest. The objection of multifariousness is confined to cases where the case of each defendant is entirely distinct and separate in its subject-matter from that of his co-defendants. All that can be done in each particular case, as it arises, is to consider whether it come nearer to the class of decisions where the objection is held fatal, or to the other class, where it is not.—*Kennedy v. Kennedy*, 2 Ala. 571; *Gaines and Wife v. Chew*, 2 How.

619, 641 ; *Horton v. Sledge*, 29 Ala. 478. If the complainant has an equitable right against each of the defendants in the subject-matter of the suit, she may proceed against all of them in one suit. The claim for rents of the dower interest from the death of the husband to the assignment of dower, was a single demand, and shown by the authorities before cited to be recoverable in chancery. The administrators having received a part of the rents, and having leased the lands and taken notes for the remainder, must be considered as holding them for the widow.—*Boyn-ton v. Sawyer*, 35 Ala. 497 ; *McLaughlin v. Godwin*, 23 Ala. 846. Riggs and Hunter were the tenants of the administrators. If they had not paid the rent due from them before the assignment of dower, they, too, were accountable to the dowress in equity up to that time : for though a tenant may not deny his landlord's title, he may show that it has passed to another by operation of law.—*English v. Key*, 39 Ala. 113 ; Rev. Code, §§ 2616, 1568. The demurrer was properly overruled.

It is objected to the decree, that as the decedent had leased the lands before his marriage with the appellant, his administrators were not liable to her for the rents accruing under that lease. An estate for years, or other mere chattel interest, interposes no impediment to a title of dower. If rent be reserved to the husband, the widow is entitled, upon endowment, to a proportionate part of such rent.—*Herbert v. Wren*, 7 Cranch, 370 ; 1 Hilliard on Real Prop. 3d ed., p. 103, § 46 ; 1 Scribner on Dower, p. 361, § 6.

It is further objected that Riggs and Hunter are liable at law only, if at all, for the rents accruing after the allotment of dower. These rents could certainly have been recovered in an action at law, but as the jurisdiction of equity had attached, that court will complete justice between the parties by settling a mere matter of account.—*Stow v. Bozeman's Exr's*, 29 Ala. 397. There would be more force in this objection if the assignment of dower *per se* evicted the tenant. But although as soon as the premises have been set out and assigned to the wife, and the allotment confirmed by the court, the freehold vests in her by virtue of her husband's seizin, and her estate is a continuation of

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his by appointment of law, the tenant is not required to be ousted.—Coke, Litt. 239, *a*; *Windham v. Portland*, 4 Mass. 384; 1 Hilliard on Real Prop., 3d ed., p. 103, § 46, and note *b*.

Whether or not the tenants were at liberty to relinquish possession of any part of the dower interest on its assignment, there is no evidence that they did so. They were liable for the rent which accrued during their possession. Rev. Code, 2616, 1568.

The administrators could not be liable otherwise than individually for the rents accruing under the lease made by them.

The report of the register, ascertaining the value of the rents, was not objected to.

The decree is affirmed.

NOTE BY REPORTER.—At a subsequent day of the term appellants applied for a rehearing, to which the following response was made :

B. F. SAFFOLD, J.—We have carefully considered the application for a rehearing. The matters on which it is based were not slighted in the former investigation, but received due attention. We have reviewed that examination, and can not see that there is error in the decision.

The rehearing is denied.



THOMAS ET AL. *vs.* BIBB ET AL.

[ATTACHMENT--"ACT FOR PROTECTION OF AGRICULTURAL LABORERS;" UNCONSTITUTIONALITY OF.]

1. *Objection, what can not be raised for first time in appellate court.*—The objection that no complaint was filed can not be made for the first time in the supreme court, when the record shows that the parties appeared by attorney in the court below.
2. *Act of December 28th, 1868, entitled "An act for the protection of agricultural laborers;" unconstitutionality of.*—The "Act for the protection of agricultural laborers," approved December 28th, 1868, is unconstitutional, because it does not provide for a trial by jury; there being no provision for such a trial in the act, or by the general law, either in the probate court, or in the circuit court on appeal.
3. *Same.*—An act of the legislature conferring additional jurisdiction on the probate court, without provisions in the act for an appeal, is not unconstitutional, if an appeal is provided by the general law.

APPEAL from the Probate Court of Montgomery.  
Tried before Hon. GEORGE ELY.

The facts upon which the case turns are set out in the opinion.

WATTS & TROY, and GRAVES & RHEA, for appellants.  
JOHN G. FINLEY, *contra*.

B. F. SAFFOLD, J.—The appellees, upon affidavit, reciting that the appellants were justly indebted to them four hundred dollars for services as agricultural laborers, and that a portion of the crops cultivated by them had been removed from the premises, whereon they were grown, without full payment of all wages due, obtained an attachment returnable to the probate court. This attachment was levied on four bales of cotton, in the possession of Lehman, Durr & Co., who were also summoned as garnishees. The cause was tried by the probate court and judgment rendered against the defendants, the entry of which recites that the parties came by their attorneys, and

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the evidence being heard the cause was submitted to the court, &c. The defendants excepted to the rendition of the judgment.

We will not consider the assignment of error, in reference to the amendment of the affidavit, because it was not excepted to on the trial, and is not urged by the appellant's counsel.

The objection, that no complaint was filed, can not be made for the first time in this court. As the parties appeared by attorney, we are authorized to presume that it was dispensed with or lost.—*Allen v. Harper*, 26 Ala. 686; *Bancroft v. Stanton*, 7 Ala. 351.

It is insisted that the probate court had no jurisdiction to try the case, because the act of the legislature authorizing the proceeding is unconstitutional—1st. In not providing for an appeal; 2d. In not providing for a trial by jury. In support of the first ground of objection two cases are cited.—*Ex parte Haughton*, 38 Ala. 570, and *Tims v. The State*, 26 Ala. 165. The decision in these cases was based upon the fact that the proceedings were before a justice of the peace, and of a criminal character, concerning which no appeal was provided, either by the general law or the special acts conferring the jurisdiction. In the case of *Tims v. The State*, the court says: "The general law, having no application, and the act itself not providing for an appeal, the constitutional right is not secured! These decisions, moreover, were constructions of a provision of the constitution exclusively applicable to cases tried before justices of the peace.—Const. Art. 6, § 13. The Revised Code, section 2247, provides that "any party to a suit or proceeding aggrieved by a final judgment, decree or order of the judge of probate in such suit or proceeding, may appeal to the circuit or supreme court therefrom," &c. As to the second ground of objection, the right of trial by jury is confined to cases in which it was conferred by the common law, to suits which the common law recognized amongst its old and settled proceedings and suits, in which legal rights were to be ascertained and determined, in contradistinction to those in which equitable rights alone were recognized, and equitable remedies were admin-

istered, or in which was a mixture of law and equity.—Story on Const. § 1763; *Tims v. The State*, 26 Ala. 165; *Boring v. Williams*, 17 Ala. 510. Our State constitution confers upon the probate court jurisdiction of contracts for labor, a court in which the trial by jury does not prevail. In consideration of the changes which are continually happening in the affairs of society—the great change which has recently taken place in our society—it was doubtless thought expedient and wise, while preserving this invaluable right intact, to present to the people a speedier, and (in many cases) a more preferable mode of determining questions of property. The probate court answers generally to the spiritual court of the common law, and, in the matters of its peculiar jurisdiction, no right to a trial by jury existed previously, or is conferred by the constitution. The “Act for the protection of agricultural laborers,” (Acts of 1868, p. 455,) was designed to put into operation a provision of section 9, of article 6, of the State constitution. How can this provision be made to harmonize with section 13 of article 1, “that the right of trial by jury shall remain inviolate.” It will be observed that the same question is presented respecting the jurisdiction of justices of the peace.—Const. Art. 6, § 13. The court of a justice of the peace may be said to be really a jury court, because, in their quarter sessions, if they inquire of any offense, or decide any cause between party and party, they do it by jury.—Lamb. Eiren, 384. But, without provision by law, they can not impanel a jury; though the justice’s court has been a jury court in this State since 1858, yet from the inception of the State to that time it was not. The right to the circuit court, and a trial *de novo* there, were all the time secured by law, and thus was the right of trial by jury preserved. In appeals from the probate court the appellant may go either to the circuit or supreme court, where the issue is tried without a jury, and on the record only. It must be conceded that cases of which jurisdiction is given to the probate court, by the act under consideration, are such as the right of trial by jury attaches to. Neither the special act nor the general law secures the right. We are therefore impelled to the conclusion that



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the said act is unconstitutional. In view of the great benefit to be derived to the people from the prompt and speedy determination of suits respecting small debts, and, especially those arising out of an interest so great and indispensable as that of agriculture, we feel it incumbent upon us to say that the objection to the act would be remedied either by a provision for an appeal to a jury, or one for an appeal to the circuit court, with a trial *de novo*, as in the case of justices of the peace.

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6. *Duty of persons arrested illegally.*—When there is no reasonable cause to apprehend any worse treatment than a legal arrest should subject him to, it is the duty of a person to submit to an illegal arrest, and seek redress from the law.—*S. C.*..... 41

ATTACHMENT—GARNISHMENT.

1. *Attachment; how only can be abated.*—An attachment without affidavit and bond, can only be abated on plea of the defendant, filed at the return term. A motion to quash should be overruled.—*Free v. Howard, Adm'r*..... 195

## ATTACHMENT—GARNISHMENT.—CONTINUED.

2. *Clerical misprision ; what will be held to be.*—The test of a writ of attachment being the words, "Witness, W. P. S., clerk of said circuit court," when the writ is returnable to the city court, and recites that complaint on oath had been made "to me, W. P. S., clerk of the city court ;" the word circuit will be considered a mere clerical error, cured by the judgment, if not previously objected to. *Quere.*—Whether the clerk of the circuit court may not issue an attachment returnable to the city court within his county.—*S. C.*... 195
3. *Attachment ; when premature and void.*—An attachment issued on the 9th day of November against one who had agreed to deliver cotton that fall, is without authority of law and void, the obligor not being in default until the expiration of the fall, and the demand not being a debt.—*Moore v. Dickerson*..... 485
4. *Attachment and affidavit, variance between ; how can not be taken advantage of.*—A variance between the affidavit and attachment and the complaint, can not be taken advantage of by demurrer to the complaint.—*Odum v. Shackleford*..... 331
5. *Sheriff, return of ; how may be amended.*—The sheriff's return of the levy of an attachment, sued out by a landlord against the crop of his tenants, may be amended, so as to show that the crop levied on was grown on the rented land.—*Gabel v. Hammerwell et al.*.... 336
6. *Form of action ; when one may be adopted for distinct causes of action.*—A plaintiff may proceed in one action for damages for breaches of two or more attachment bonds, executed by the same obligors in his favor.—*Gabel v. Hammerwell et al.*..... 331
7. *Attachment bond ; what sufficient assignment of breaches of.*—It is a sufficient assignment of breaches of an attachment bond, to aver that the attachment bond was sued out—1st, vexatiously ; 2d, wrongfully ; and that being so vexatiously and wrongfully sued out, it was levied on the goods and effects of the plaintiff, whereby he was injured.—*S. C.*..... 336
8. *Affidavit ; definition of.*—An affidavit is an oath in writing, sworn to before an officer authorized to administer it, and it may or may not be subscribed by the party making it.—*Watts et al. v. Womack*. 605
9. *Same ; when sufficient to authorize issuance of an attachment.*—Such affidavit, though not subscribed by the party making it, is sufficient to authorize the issuance of an attachment, under the act of October 10th, 1868, and of December 28th, 1868, for the protection of laborers, and to enforce liens in their favor.—*S. C.*..... 605
10. *Same ; when may be amended.*—Such an affidavit, when otherwise perfect, may by leave of court be amended, by permitting the party who made it to subscribe his name to it in open court, after the return of the attachment into court, although the judge of the court is not the officer or judge before whom it was originally sworn to. In such a case the signature is a matter of form, rather than of substance.—*S. C.*..... 605
11. *Garnishee, judgment against ; what must appear to sustain.*—On appeal from a judgment against a garnishee, in order to sustain the judgment below, it must appear that a judgment had been rendered against the principal in the same court. But rather than

## ATTACHMENT—GARNISHMENT.—CONTINUED.

- reverse for such a defect a *certiorari* would be awarded to bring up the record in the principal case.—*Curry, Garnishee, v. Woodward*... 305
12. *Garnishee, answer of; when part of record*.—The answer of a garnishee, appended to the transcript, verified by affidavit and referred to in the judgment entry, is a part of the record.—*S. C.*..... 305
13. *Section 2928 of Revised Code; what statement equivalent to that required by sixth subdivision of*.—In an affidavit for attachment, a statement that the defendant "is endeavoring fraudulently and clandestinely to dispose of his effects," is equivalent to the case prescribed in the 6th subdivision of section 2928 of the Revised Code.—*Free v. Hucill*... 197
14. *Appearance, general; what is not, and can not have effect of*.—An appearance of a defendant by motion to dissolve an attachment is not a general appearance, and can not have the effect of one.—*Moore v. Dickerson*... 485

## ATTORNEY-AT-LAW.

1. *Revenue act of 31st December, 1868; what requires of lawyers*.—The revenue act approved December 31st, 1868, requires each lawyer composing a firm to pay the price prescribed for lawyers for a license, which entitles him to practice his profession in any county of the State.—*Page & Stallworth v. Jones, Judge, &c.*..... 657

## AUDITOR.

1. *Revenue law, section 120 of; does not confer judicial power on auditor*. Section 120 of that act does not confer upon the auditor any judicial authority. It only makes him, to the extent therein expressed, chief of the revenue department to insure uniformity in the execution of the law throughout the State.—*Jones, Judge, &c., v. Page & Stallworth*..... 657

## BAIL.

1. *Murder, indictment for; presumption in relation to prisoner on application for bail*.—On an application for bail by a prisoner, who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof.—*Ex parte Vaughan*..... 417

## BANKRUPTCY.

1. *Bankruptcy; when does not vitiate decree*.—A decree against a defendant as surety of a guardian is not vitiated by a plea of bankruptcy, unsupported by proof.—*Owens et al. v. Grimsley et al.*..... 359

## BILL OF EXCEPTIONS.

1. *Bill of exceptions; when does not constitute part of the record*.—A bill of exceptions not signed nor dated, constitutes no part of the record of the cause in which it purports to be taken; nor does the



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certificate of the probate judge whose signature was required, that the transcript contained the bill of exceptions, cure the defect.

*Alford v. Eubank*..... 276

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Complaint; form of, as prescribed by Code, when sufficient.*—In an action by the indorsee of a bill of exchange against the indorser, a complaint that substantially conforms to the form of complaint, in such a case, must be held to be a good complaint, whether the bill be or be not payable at a particular place.—*Battle v. Weems*... 105
2. *Same; plea, what is good in such case.*—In such a case, a plea that states that the bill was drawn and indorsed by the defendant for the accommodation of the acceptors, and without consideration, and was at the same time delivered to the acceptors, and that the plaintiff acquired the bill after maturity, and that at the maturity thereof the acceptors were indebted to the defendant in a sum larger than the amount due on the bill, is a good plea. Such facts, if true, are sufficient to overcome the presumption that the plaintiff is a *bona fide* holder for value—and to entitle the plaintiff to a recovery he must show when he acquired the bill, and that he is a *bona fide* holder for value, and without notice, &c.—*S. C.*..... 105
3. *Same; evidence, what error to exclude on plea of non-assumpsit with leave, &c.*—On the trial of such a case, on the plea of *non-assumpsit*, with leave to give in evidence any matter that may be a defense to the action, if the court excludes evidence, which, with other evidence that is admitted, tends to show that the defendant has a good defense for the reason that the plaintiff, as to him, is not a *bona fide* holder of the bill, for value, it is an error for which the judgment will be reversed and the cause remanded.—*S. C.*..... 105
4. *Indorsement, denial of execution of, or authority to make; how only can be taken advantage of.*—Since the adoption of the Code of 1852, an objection to an averment in a complaint against a corporation, that the defendant indorsed a bill of exchange by its president, A. S., involving a denial of the execution of, or want of authority to bind by, the indorsement, can only be taken advantage of, by plea verified by affidavit.—*Montgomery & Eufaula R. R. v. Trebles*.... 255
5. *Indorser before maturity, extent of liability for putting bill in circulation after dishonor; how and by whom ascertained.*—When an indorser before maturity puts a bill of exchange into circulation, after its dishonor, the nature and extent of his contract is a question of fact, to be ascertained by the jury, from his intention as shown by the evidence.—*S. C.*..... 255
6. *Indorser; duty of, when indorser is liable only on second indorsement.* If the indorser's liability is by virtue of his second indorsement only, the indorsee must demand payment of the acceptor, and give notice of his failure to pay, within a reasonable time, to be determined by the jury according to the evidence; but if the indorser intended to stand in reference to the bill as an indorser whose liability was fixed, no subsequent demand and notice is necessary. *S. C.*..... 255

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

7. *Bill of exchange, residence of party to be charged; what not sufficient evidence of.*—The name of a place where a bill of exchange was signed appearing on it, is not of itself sufficient evidence of the residence or post-office of the party to be charged.—*Sprague v. Tyson*..... 338
8. *Acceptor; when not liable for damages.*—The acceptor of a bill of exchange is not ordinarily liable for damages.—*Manning v. Kohn*.. 343
9. *Same; when may be considered indorser, guarantor, or acceptor, supra protest.*—When a bill of exchange exhibits the signature of one to whom it is not directed across its face, and another name in the lower left hand corner where that of the drawee is usually placed, the latter will be deemed the drawee, and the former will be considered the indorser, guarantor, or acceptor, *supra* protest, according to the evidence.—*Walton v. Williams*..... 347
10. *Parol evidence; when admissible to explain relation of parties to bill.*—In such a case, parol evidence is admissible to explain the relation of the parties to the bill, when sued on by the payee.—*S. C.*..... 347
11. *Non-payment, notice of; who entitled to.*—An acceptor, *supra* protest, is entitled to notice of non-payment by the drawee.—*S. C.*... 347
12. *Promissory note made in this State in 1864 not invalid for want of stamp; such note could be stamped at any time up to January 1st, 1867.*—A promissory note made in this State, in the year 1864, without an internal revenue stamp, there being no collection district established here at that time, is not invalid for want of such stamp, but by virtue of section nine, of the internal revenue act of the 13th of July, 1866, such note may have a stamp affixed thereto, by any one having an interest therein, at any time before the 1st day of January, 1867, and after being so stamped, is as valid and admissible in evidence as though it had been stamped at the time it was made. *Quere*—Whether without being so stamped, it could be used as evidence?—*McElvain v. Mudd, Adm'r.*..... 48
13. *Promissory note for purchase-money of slaves; sufficient consideration to support, notwithstanding emancipation proclamation, when contract of sale was bona fide, and made between citizens of the rebel States after the proclamation and before the suppression of the rebellion.*—Notwithstanding the proclamation of the president of the United States, of the 1st day of January, 1863, known as the emancipation proclamation, there continued an uncertain and contingent interest and property in slaves, which was a sufficient consideration to sustain contracts, made in good faith, in the rebel States, and between citizens of the said States, contracting with each other, in relation to that species of property, between the date of said proclamation, and the suppression of the rebellion, or the end of the war—consequently, a sale of slaves, made in good faith, in this State, between citizens thereof, between those periods, is a valid sale, and a promissory note made to secure the purchase-money, is a valid note, supported by a sufficient consideration, and may be recovered upon in the courts of this State. (*PETERS, J., dissenting.*)—*S. C.*..... 48

## BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

14. *Confederate treasury-notes, promissory note for loan of; without consideration, and void.*—A promissory note given in consideration of Confederate treasury-notes loaned, is without proper consideration, and void, notwithstanding the contract was made between citizens of the State, and without any illegal intent. (PECK, C. J., *dissenting.*)—*Hale v. Huston, Sims & Co.* ..... 134
15. *Promissory note, payee of; presumption prima facie of title in.*—In an action by executors on a promissory note, found by them among the papers of their testator, and not payable to him, but to a third person, in which the defendants file a sworn plea that the said note was given and payable to said third person, and never endorsed or assigned to plaintiffs' testator, and that the plaintiffs had no interest or title in said note, and where the evidence is contradictory—that on the part of the plaintiffs tending to show that the said note had been transferred by the payee, and that on the part of the defendants, that there had been no such transfer, but that the note was still the property of the payee—it is an error, for which the judgment will be reversed and cause remanded, to refuse to give a charge, in writing, asked by the defendants, that the note being payable to a third person, the law presumes him to be the owner until the evidence shows that his title to the note has terminated.—*Turnley et al. v. Black et al.* ..... 159
16. *Record; what not part of.*—In a judgment by default, the note which was the cause of action is not a part of the record on appeal.—*Rhodes v. Walker, Adm'r.* ..... 213
17. *Promissory note; what constitutes, although accepted by a third person.*—An instrument which is in the form of a note, but which, in addition, is addressed to a third person, who accepts it, is a promissory note, and may be so declared on.—*Brazelton et al v. McMurry* ..... 323
18. *Surety on promissory note; what releases.*—The extension of the time for the payment of a promissory note, by agreement between the payee and the principal maker of the note, without the consent or ratification of the surety, discharges the surety. The actual payment of \$120 extra interest, as a consideration for such agreement, is sufficient.—*Cox v. Mobile & Girard R. R. Co.* ..... 611

## BONDS.

1. *Bond; failure to file, does not ipso facto vacate office.*—The failure of an officer to file his bond within the time prescribed by law, does not *ipso facto* vacate his office.—*State ex rel, v. Falconer.* ..... 696
2. *Act approved October 8th, 1868; what waived.*—The act of the legislature, approved October 8, 1868, extending the time within which tax collectors should file their official bonds, was a waiver of the right of the State to claim a forfeiture of office against those who had not at that time given bond.—*S. C.* ..... 696
3. *Attachment bond; what sufficient assignment of breaches of.*—It is a sufficient assignment of breaches of an attachment bond, to aver that the attachment was sued out—first, vexatiously; second,



## BONDS—CONTINUED.

wrongfully; and that being so vexatiously and wrongfully sued out, it was levied on the goods and effects of the plaintiff, whereby he was injured.—*Gabel a. Hammerwell*. . . . . 336

## CERTIORARI.

1. *Adjournment of court, record of proceedings after; what can not be brought to supreme court on certiorari.*—The record of proceedings, in the court below, after its final adjournment, and after appeal to the supreme court, except an amendment of the record of the entry of the judgment *nunc pro tunc*, or of some of the proceedings antecedent thereto, can not be brought up to this court, upon the return of a *certiorari* sent down to the court below, upon a suggestion in this court of a diminution of the record. *Monterallo Coal Mining Co. v. Reynolds*. . . . . 252
2. *Certiorari; when proper remedy.*—*Certiorari* is a proper remedy to remove, for revision, a cause from the probate to the appellate court, where the order, decree, or proceeding, complained of, is claimed to be void.—*Ex parte Boynton*. . . . . 261
3. *Same; what should be done in primary court before applying for.*—A motion to set aside the void action ought, however, to be first made in the primary court.—*S. C.*. . . . . 261
4. *Same; when resort may be had directly to supreme court.*—If such action occurs in a court from which an appeal may be taken to this court, or before a judge or court equal in authority and jurisdiction to any other inferior judicial tribunal, resort may be had directly to this court for the exercise of its powers of general superintendence and control of inferior jurisdiction.—(PECK, C. J., *dissenting*).—*S. C.*. . . . . 261
5. *Same; when lies.*—As no appeal is provided by law from the action of the probate court, overruling a motion to make the assignee in bankruptcy of a removed executor a party to the final settlement of his accounts, and to render a decree in favor of the assignee for the amount due the bankrupt by the estate, a writ of *certiorari* and *mandamus* is the remedy to revise such action.—*Appling, Judge, &c., v. Bailey, Assignee*. . . . . 333
6. *Same, effect of; what judgment must be given on.*—*Certiorari*, unless the statute otherwise directs, brings up the record of the proceedings in the court below, and the appellate court must give judgment on this record. It must affirm or quash the judgment of the inferior tribunal. It cannot reverse the judgment and remand the cause for a new trial.—*Fore v. Fore*. . . . . 478
7. *Same; when will be issued in garnishment suit.*—On appeal from a judgment against a garnishee, in order to sustain the judgment below, it must appear that a judgment had been rendered against the principal in the same court. But rather than reverse for such a defect, a *certiorari* would be awarded to bring up the record in the principal case.—*Curry, Garnishee, v. Woodward*. . . . . 305

## CHARGE OF COURT.

1. *Charge to jury ; what should be given, on trial of defendant, where the evidence is chiefly circumstantial.*---On the trial of an indictment for grand larceny, where the testimony against the accused is chiefly circumstantial, a charge asked by the prisoner, "that innocence should be presumed, until the case proved against the prisoner, in all its material circumstances, is beyond any reasonable doubt ; and that the evidence ought to be strong and cogent, to find the defendant guilty as charged," is proper, and should be given.---*Moorer v. State*..... 15
2. *Charge to jury ; what is improper in such a case.*---A charge in such a case as this, that "if the jury believe the evidence, they must find the defendant guilty ;" is improper ; such a charge should never be given, except in plain and palpable cases, where there is no room left for doubt.---*Carter v. State*..... 29
3. *Charge to jury ; what improper, when evidence is prima facie only.* On the trial of an indictment for burglary, a charge by the court, "that if the jury believe the evidence they must find the defendant guilty," is improper, when the only evidence of guilt is *prima facie*, and founded wholly on the fact of the possession, by the accused, of the stolen goods.---*Crawford v. State*..... 45
4. *Proper practice in such case.*---The fairer practice in such cases is for the court to charge the law and leave the facts wholly to the jury.---*S. C.*..... 45
5. *Charge of court ; what erroneous, as to amount of recovery for hire of slave.*---Where there was evidence before the court that the slave was not worth, in good money, the sum agreed to be paid in the note, a charge to the jury that the plaintiff was entitled to recover the amount of the note and interest, is erroneous.---*Buford v. Tucker*..... 89
6. *Charge to jury ; what erroneous.*---On the trial of such a case a charge of the court to the jury, that if they believe the evidence, the plaintiff is entitled to recover, is erroneous, when the evidence tends to show that the bill was drawn and indorsed without consideration, and that the plaintiff acquired it after dishonor.---*Battle v. Weems*. 105
7. *Same ; when only such charge shall be given.*---Such a charge should never be given, except in a very clear case---a case free from all doubt---inasmuch as it may encroach upon the province of the jury.---*S. C.*..... 105
8. *Charge to jury ; what erroneous on trial for rape.*---A charge to the jury, that "if the testimony of the prosecutrix, as to the guilt of the prisoner, is sufficiently clear and explicit to convince your minds, beyond a reasonable doubt, of the prisoner's guilt, then you would be authorized to convict upon *her testimony alone* ; but if you have any doubts of the prisoner's guilt, *upon her evidence*, then you must inquire whether her evidence has any support," in such a case as this, where such support can come only from the testimony of witness, who is impeached, and who knows nothing of the commission of the offense, except from hearsay, is calculated unnecessarily, to violate that great care and caution so essential in determining

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- the guilt of an accused, on a charge of rape. (PECK, C. J., *not concurring in the criticism on the charge.*)—*Leoni v. State*. . . . . 110
9. *Failure of consideration; what error to charge as.*—A charge to the jury, in an action on a note given on the sale of slaves, that if the consideration of the note was the price of slaves sold, then there was a failure of consideration, and they must find for the defendant, is erroneous.—*Fitzpatrick, Ex'r, v. Heirne*. . . . . 172
10. *Charge to jury; what not erroneous to refuse.*—There is no error in refusing to charge the jury that a judgment is a lien upon certain property, which may be properly claimed as exempt from execution.—*Watson et al. v. Knight*. . . . . 352
11. *Charge to jury; what should not be given.*—In a criminal case, a charge which instructs the jury, in referring to a part of the testimony for the defense, "that you are not bound to believe one word of the testimony unless you are satisfied it is true, and of this you are the judges," is too broad. It can not be said to be in support of the credibility of the testimony referred to, and most probably would be construed by a jury as an assault upon it, and as an intimation that it was unworthy of influence in making up their verdict. The jury can not capriciously reject any evidence, delivered on the trial before them, unless it is in some way impeached or contradicted in a manner allowed by law.—*Crawford v. The State*. . . . 382
12. *Larceny; what charge as to erroneous.*—A charge of the court that an unlawful taking and carrying away is sufficient to constitute the offense of larceny is erroneous. The taking and carrying away must be felonious as well as unlawful.—*Cassir Williams v. The State*. . . . . 396
13. *Charge of court; what erroneous.*—In a criminal case, a charge of court, *mero motu*, which needs explanation to rescue it from unfairness, and which is calculated to prejudice the defense of the accused, is erroneous.—*Wicks v. State*. . . . . 398
15. *Charge to jury; what should be refused.*—A charge that seems to put upon the jury the determination of a question which, on the evidence, more properly belongs to the court, should be denied.—*So. Ex. Co. v. Crook*. . . . . 469
14. *Abstract charge; when not ground for reversal.*—An abstract charge, shown by the record not to have prejudiced the appellant, is no ground for the reversal of a judgment.—*James et al. v. Johnson, Adm'r*. . . . . 629
16. *General charge on all the evidence; when improper.*—When a general charge by the court, which rests the conviction on all the evidence delivered before the jury, relevant or irrelevant, the conviction will be reversed, unless it appears from the record, that no conviction could be had otherwise than one which was certainly correct.—*DePhue v. The State*. . . . . 32
17. *Charge as to proper inquiry for jury, when estoppel is set up.*—In a suit against warehousemen on cotton receipts for the non-delivery of cotton, the defendant's witnesses testified that the plaintiff, in the presence and hearing of the defendant, declared that he had sold his cotton, a part of which had already been deposited at the



## CHARGE OF COURT—CONTINUED.

warehouse, to another person who was present, and who immediately directed the manager of the warehouse, in the presence and hearing of the plaintiff and defendant, to ship the cotton to his order as he received it, which was accordingly done,---*Held*, that a charge to the jury, that if these facts occurred after the receipts were given for the cotton, the verdict should be for the defendant, but nothing which transpired before could bar the plaintiff's action, was erroneous, and that the proper inquiry for the jury was, whether the declarations and conduct of the plaintiff, under the circumstances, were calculated to, and did, mislead the defendant.

*Abrams, Surv. Part., v. Seale, Adm'r*..... 97

## CHANCERY.

## I. JURISDICTION.

1. *Written instruments ; when equity will grant relief in cases of*.---Equity will grant relief in cases of written instruments where there is a plain mistake, clearly made out by satisfactory proof.---*Arnold v. Fowler* ..... 167
2. *Chancery, what has jurisdiction to entertain*.---If a ward die, and his guardian is appointed administrator of his estate, the probate court has no jurisdiction, at the instance of a distributee, to entertain an application to call the guardian to a settlement of his guardianship. In such a case the remedy is in chancery, where the distributee, on a proper bill filed for that purpose, can make the guardian a party in both characters---as guardian and as administrator---and pray for a final distribution of the estate, by the party as administrator and as guardian on a final accounting and settlement of his guardianship.---*Carswell v. Spencer*..... 204
3. *Section 1, article 8, of constitution of Alabama ; effect of, on venue of cause in chancery*.---Section 8 of article 6 of the constitution of this State does not confine the venue of a chancery cause to the county of the defendant's residence, or to that in which the property, the subject-matter of controversy, is situated. (PETERS, J., *dissenting*.)---*Fulmore et al. v. Brady*..... 218
4. *Bill in chancery ; what not without equity*.---A bill in chancery by the widow to recover the rents of her dower interest, from the death of the husband to the assignment of her dower, is not objectionable for want of equity.---*Boyd et al. v. Hunter*..... 705
5. *Same ; when equity will settle matters of account which are enforceable at law*.---The jurisdiction of equity having attached, that court will complete justice between the parties by settling an account for rent due by the tenants, up to the termination of the defendant's possession, although such rents might be recovered at law.---*S. C.*..... 705
6. *Bill for new trial after judgment ; when has equity*.---A bill for new trial after judgment at law, is not without equity, when it alleges and sets out in the bill newly discovered evidence which shows that the complainant was discharged from all liability at the date of the trial at law, but which could not then be made to appear by proof, though it existed, but of which complainant, after using all

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- due diligence, then had no knowledge, or opportunity of knowing, and which was discovered after the trial at law.—*Cox v. Mobile & Girard R. R. Co.* ..... 611
7. *Same; diligence, what sufficient.*—When the bill shows that the complainant used such diligence to discover the new evidence, as was in his power, before the trial at law, and failed, this is sufficient diligence.—*S. C.* ..... 611
8. *Chancery, jurisdiction of; what sale will enjoin.*—A court of chancery will interpose and prevent a sale under an execution in behalf of a *bona fide* purchaser of real estate for a valuable consideration, when the purchase was made after the rendition of the judgment, on which the execution was issued, but before the delivery of an execution upon the judgment to the sheriff of the county where the property is situated.—*Martin v. Hewitt.* ..... 418
9. *Same.*—Such a sale, if permitted to be made, would be a cloud upon such purchaser's title, and as there is no remedy at law to prevent such a sale, or to remove the cloud that would thereby be brought upon his title, a court of chancery will, on his application, exercise its preventive jurisdiction and perpetually enjoin a sale under an execution, in such a case, and thereby quiet his title. *S. C.* ..... 418
10. *Decree for divorce in favor of husband, by court of another State; when no bar to jurisdiction of court to decree relief in suit for divorce by the wife in this State, against the husband.*—A suit for divorce, commenced by the wife in the courts of this State, who is herself resident in this State at the time she sues, is not to be affected by another suit, subsequently commenced by the husband, for a divorce against her in the courts of another State, to which he has removed, and to which the wife did not accompany him, and to which suit the wife was not a party, except by publication, although the husband's suit may be terminated by a decree in his favor against the wife, before her suit against him is terminated here. The jurisdiction of the court of this State, having attached in favor of the wife here, it will continue to be entertained, until its powers are fully enforced in her favor, regardless of the decree in favor of the husband rendered by the court of such other State.—*Turner v. Turner.* ..... 438
11. *Cloud from title; when equity will remove.*—A man who married in this State before 1842, and declined to take marital possession of the wife's estate during coverture, and declared that the same belonged to her, and not to him, up to the date of his death in 1862, having waived and abandoned his marital rights over her estate thereby, the right of the wife reviving on the death of the husband, in such a case equity will interfere to remove a cloud from the title of her land, unintentionally occasioned by the husband and wife, in adjusting the deed of conveyance, on an exchange of one tract of land for another tract for her benefit.—*Barclay v. Henderson et al.* ..... 269
12. *Bill in chancery; when without equity.*—Where the allegations of

## CHANCERY—CONTINUED.

- a bill, filed to enjoin a judgment at law, show that there was a well ascertained and sufficient remedy at law, it is without equity, unless it also shows that the defense at law was unknown to complainant at the time of the rendition of the judgment.—*Garrett et al. v. Lynch*..... 683
13. *Application for dower; when chancery has jurisdiction of.*—When lands have been aliened by the husband, and the wife has not relinquished her dower, then if an assignment can not be made by metes and bounds without injustice, the judge of probate must decline jurisdiction, and application must be made to the court of Chancery.—*Snodgrass v. Clark*..... 198
14. *When executrix liable at law as executrix.*—An executrix with power to “carry on” the testator’s farm as he did in his life-time, is a trustee; and if the will gives her authority to contract debts for expenses incidental to the management of such estate, she is liable at law for such debts as such executrix. A party having a claim against such executrix can not go into chancery in the first instance to enforce its payment, except to reach equitable assets. *Wade v. Pope et al.*..... 690

## II. PLEADINGS AND PRACTICE.

1. *Bill in chancery, motion to dismiss for want of equity; allegations of, must be taken as true.*—On a motion to dismiss a bill for want of equity, the allegations, whether in the bill, or of the exhibits, which are a part of the bill, must be taken as absolutely true, unless they contradict each other, or are so made as to impair their own force. *Cox v. Mobile & Girard R. R. Co.*..... 611
2. *Bill in chancery; what, not without equity.*—A bill in chancery by the widow to recover the rents of her dower interest from the death of the husband to the assignment of her dower, is not objectionable for want of equity.—*Boyd v. Hunter*..... 705
3. *Same; what not multifarious.*—It is not multifarious, because a demand for the rents derived from a lease made by the husband is joined with a claim for rents against the administrators personally, accrued before and after the allotment of dower.—*S. C.*..... 705
4. *Same; in what suit, heirs of decedent, are not necessary parties defendant.*—The heirs at law of the decedent are not necessary parties defendant with the administrators, to a suit against the latter by the widow for the rents of her dower interest after its assignment.—*S. C.*..... 705
5. *Same; what not misjoinder of parties.*—Nor is it a misjoinder of parties to unite the tenants of the administrators with them as defendants.—*S. C.*..... 705
6. *Deposition, suppression of; when will not be allowed, unless adverse party shows actual injury.*—The suppression of a deposition, on motion of the adverse party, because the witness had been furnished with a copy of the interrogatories, and cross-interrogatories, before the examination by the commissioner, will not be allowed, unless the party complaining shows actual injury to him by such



## CHANCERY—CONTINUED.

- practice. In such a case error will not be presumed.—*Goodrich v. Goodrich*..... 671
7. *Same; English orders and rules of practice; how regarded.*—The English orders and rules of chancery practice, in such cases, are not to be regarded as peremptory, but only “as furnishing proper analogies to regulate the practice” in our courts.—Chancery Rule 7, Revised Code, p. 824.—*S. C.*..... 671
8. *Deposition, suppression of; when failure or refusal of witness to answer interrogatories will not be cause for.*—The refusal or failure of a witness to answer a question, addressed to her on an examination before the commissioner, will not be held a sufficient reason to suppress such deposition on motion of the adverse party, when it appears that the interrogatory is sufficiently answered in another portion of the deposition, or that the answer would be immaterial on the trial on the merits of the cause.—*S. C.*..... 671
9. *Decree in chancery; when improper ruling as to parts of interrogatories, &c., will not reverse.*—When there are numerous objections to parts of interrogatories, some of which may have been improperly decided in the court below, a decree in chancery will not be reversed, if it appears that there is sufficient testimony, beside that objected to, to sustain the chancellor’s decree.—*S. C.*..... 671
10. *Evidence; what insufficient to establish charge of cruel treatment and violence.*—The deposition of one witness, the sister of complainant, whose general character is proved to be bad, and who is contradicted as to a material fact by the brother of the defendant, is not sufficient to establish the charge of cruel treatment and violence, committed on the person of the wife, by the husband.—*Hughes v. Hughes*..... 699
11. *Defendant’s answer; for what purpose can not be looked to.*—The answer of the defendant, in such a case, can not be looked to, either to support the charges in the bill, or to sustain the deposition of a witness whose general character is shown to be bad.—*S. C.*..... 699
12. *Absent witness, admissions of what would swear if present; force and effect of.*—Admissions, of what it is stated absent witnesses will swear, made by the plaintiff’s solicitor to obtain a hearing and prevent a continuance, must be held to have the same force as the deposition of such witnesses would be entitled to have if regularly taken by the defendant.—*S. C.*..... 699
13. *Next friend; when may be taxed with costs*—A next friend, in whose name the bill of a wife is filed to obtain a divorce, if it be dismissed, may properly be decreed to pay the cost.—*S. C.*..... 699
14. *Admission of facts by demurrer for want of equity; effect of.*—The admission, by demurrer, to the bill for want of equity, of the truth of facts which show that after the trial at law, the complainant discovered new evidence which completely established his discharge, is an admission of the fact of the discharge. Such admission is not merely cumulative evidence of the existence of the discharge, but is an admission of the fact of the discharge itself.—*Martin v. Hewitt*..... 419

## CHANCERY—CONTINUED.

15. *Foot-note, omission of, to bill in chancery ; effect of.*—The omission of a note, at the foot of a bill of complaint, required by the 10th rule of chancery practice, is a good cause of demurrer ; but it is an amendable error, and does not go to the merits of the case, and on sustaining a demurrer for that cause the bill ought not to be dismissed, but the complainant should be permitted to amend on terms.—*S. C.* ..... 419
16. *Same ; when omission of, will be held to be waived.*—If a defendant, notwithstanding such an omission, files a full answer, with a demurrer for that cause, and then goes to a final hearing on the bill and answer and an agreed state of facts, he will be held to have waived the error, and will not be permitted to take advantage of the defective character of the bill, either on the hearing, or on appeal.—*S. C.* ..... 419
17. *Same, omission of, at bottom of bill ; effect of.*—The omission of the note in writing, at the foot of a bill in chancery, of the particular statements or interrogatories which each defendant is required to answer, precludes the complainant from any advantage to be derived from the failure of the defendant to answer the allegations of the bill.—*Sprague v. Tyson.* ..... 338
18. *Injunction ; when will be dissolved.*—An injunction to restrain the collection of a judgment at law, will be dissolved upon the coming in of the answer of a sole defendant, which denies the allegations of the bill upon which its equity rests.—*Yonge v. Shepperd.* ..... 315
19. *Same ; what complainant must offer.*—A party who asks an injunction to restrain the collection of a judgment, or of an ascertained and admitted debt, secured by mortgage, must pay or tender payment for what he really owes to the respondent in the bill, or show some sufficient cause for his failure to do so.—*S. C.* ..... 315
20. *Misjoinder of parties ; multifariousness, or want of equity ; what bill not defective for*—A bill in chancery by a ward, and another entitled to an annuity charged on the property of the ward against the guardian and his sureties for a settlement of the guardianship account, is not defective for misjoinder of parties, multifariousness or want of equity.—*Owens et al. v. Grimsley et al.* ..... 359
21. *Parties defendant to bill in chancery, misjoinder of ; how only can be taken advantage of.*—The objection of misjoinder of parties defendant to a bill in chancery can only be taken advantage of by those improperly joined, and is fatal to the suit only against them.—*Robison et al. v. Robison pro ami.* ..... 269
22. *Probate court ; what application has not jurisdiction of.*—If a ward die, and his guardian is appointed administrator of his estate, the probate court, in such a case, has no jurisdiction, at the instance of a distributee, to entertain an application to call the guardian to a settlement of his guardianship, for the reason that any decree rendered in such a case, must necessarily be rendered in favor of the guardian, in his character of administrator ; and as no judgment or decree can be rendered for, and against the same party, such a judgment or decree, if rendered, is a nullity. The remedy, in such a case, is in chancery.—*Carswell v. Spencer* ..... 204

CHANCERY—CONTINUED.

23. *Restitution; when necessary to obtain reversal of decree.*—One who receives and retains the purchase-money of land sold under a decree, can not reverse the decree, if the reversal will divest the title.  
*Davis et al. v. Davis et al.* ..... 342
24. *Written instruments; what testimony insufficient to reform.*—A written agreement by the vendor to deliver a lot of cotton to the purchaser at a specified place, after due notice given, fire risk excepted, will not be reformed into one to pay the freight only, when the testimony of the complainant is negatived by that of the defendant, and the only other witness of the complainant testifies that the sale was pending two or three days, and that he did not pay particular attention to what was being said by the parties.—*Arnold v. Fowler.* ..... 167

CODE OF ALABAMA.

1. § 434 construed.—*Lott, tax collector, v. Hubbard.* ..... 593
2. § 435 construed.—*S. C.* ..... 593
3. § 534 construed.—*S. C.* ..... 593
4. § 2167 construed.—*Cunningham, Adm'r., v. Beard.* ..... 318
5. § 2168 construed.—*S. C.* ..... 318
6. § 2196. What sufficient filing of claim under.—*Erwin et al. v. McGuire et al.* ..... 499
7. § 2353. What necessary to authorize divorce under.—*Hughes v. Hughes.* ..... 698
8. § 2661 not unconstitutional.—*Curry v. Reynolds.* ..... 349
9. § 2811. To what cases does not apply.—*Landford v. Patton, Donegan & Co.* ..... 585
10. § 3438. What authorizes in regard to dissolution of injunctions.  
*Mobile School Commissioners v. Putnam et al.* ..... 507  
Also, *Garrett et al v. Lynch.* ..... 683
11. § 3577. Indictment under, when sufficient.—*White v. The State.* 409
12. § 3577. Deputy sheriff, within meaning of.—*S. C.* ..... 409
13. § 3691. Indictment under, when sufficient.—*Murrell v. The State.* 367
14. § 3695. Indictment under, when defective.—*Crawford v. The State.* ..... 382
15. § 3945 is constitutional.—*Grogan v. The State.* ..... 9

COMMON CARRIER.

1. *Consignee, presumption of ownership; prima facie only, and may be rebutted.*—The consignee is the person *prima facie* entitled to sue a common carrier for loss of property, but this presumption may be rebutted by proof.—*So. Exp. v. Caperton.* ..... 101
2. *Same; who may sue in his own name, on contract with carrier.*—One who has a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement, may support an action, in his own name, on the contract.  
*S. C.* ..... 101
3. *Common carrier, stipulation by; what is unreasonable and inoperative.*—A stipulation in a receipt given by a common carrier, that it



## COMMON CARRIER—CONTINUED.

- should not be liable for loss of a package of money unless a claim for the loss was made within 30 days from the date of the receipt, is unreasonable, and tends to fraud, and is inoperative. *Quere*—Whether a printed blank receipt, containing restrictions of his responsibility, and to be used generally, filled up by the common carrier and given to a party sending goods, is a special contract? *S. C.* ..... 101
4. *Common carriers ; when express companies are.*—Express companies who are engaged not only in the transportation of small parcels, packages, and articles of value, properly so-called, but also in the carriage of goods, wares and merchandise, and of the great staples and products of the country, are common carriers, and subject to the liabilities imposed by law upon such persons.—*So. Exp. Co. v. Crook.* ..... 468
5. *Same, liabilities of ; how may be limited by special contract.*—Their liabilities may be reasonably limited by special contract, but public policy will not permit common carriers, even by special contract, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves, or their servants.—*S. C.* ..... 468
6. *Same, general notices in relation to ; when operative.*—General notices, in relation to the liabilities of common carriers, are of no avail unless reduced to the form of a special stipulation, and signed by the party sending the goods, or be so brought home to his knowledge as to show his assent thereto, and be also just and reasonable.—*S. C.* ..... 468
7. *Same, printed receipts limiting liability, if no value is named in ; when will be liable notwithstanding.*—The printed receipts, generally given and used by common carriers, containing conditions limiting their liabilities to a certain sum, unless the value of each package is named and stated therein, will not exempt them from liability for the value of packages lost by the negligence or fraud of themselves or their agents.—*S. C.* ..... 468
8. *Same, statement of value of package ; when will be presumed to be waived.*—If the size or appearance of a package fairly indicates that its value is greater than the sum so named, the carrier will be presumed to waive the necessity of stating a value, unless the attention of the shipper is called to the conditions, and the value of the package is required to be given.—*S. C.* ..... 468
9. *"Package ;" what is not, in legal contemplation.*—Bales of cotton, in legal contemplation, are not packages, within the meaning of that word, as commonly understood when used in such receipts. Nor are they articles, the value of which is necessary to be stated to enable the carrier to understand the extent of his responsibility, or the care which should be observed in their transportation, or the sum to be charged for their carriage.—*S. C.* ..... 468
10. *Actions ex contractu or ex delicto ; what form sufficient in either case.* Under our system of pleading and practice, a complaint in the form given in the Revised Code against a common carrier, is sufficient to authorize a recovery, whether the cause of action be *ex contractu* or *ex delicto*.—*S. C.* ..... 468

CONFEDERATE MONEY.

1. *Confederate treasury-notes, promissory note for loan of; without consideration, and void.*---A promissory note given in consideration of Confederate treasury-notes loaned, is without proper consideration, and void, notwithstanding the contract was made between citizens of the State, and without any illegal intent. (PECK, C. J., *dissenting.*)---*Hale v. Huston, Sims & Co.*..... 134
2. *Same; bills of credit within the meaning of the constitution of the United States.*---Confederate treasury-notes are not recognized by any law of the State or of the United States as property. Their circulation was adverse to public policy. They were bills of credit emitted by an illegal combination of States in violation of the Federal constitution.---*S. C.*..... 134
3. *Ordinance No. 38 of convention of 1867, second section of; constitutionality of*---The second section of ordinance 38 of the State convention of 1866, which ordains that "all bills, bonds, notes or evidence of debt, outstanding and unpaid, given for or in consideration of bonds or treasury-notes of the Confederate States, or notes or bonds of this State, paid or redeemable in the bonds or notes of the Confederate States, are hereby declared null and void, and no action shall be maintained thereon in the courts of this State," is not unconstitutional.---*S. C.*..... 134
4. *Confederate money, payment of; when extinguishes debt.*---The acceptance of payment of a debt in Confederate currency, by the owner, in his own right, and not in a fiduciary capacity, extinguishes the debt.---*Ponder et al. v. Scott.*..... 242
5. *Sale of lands by administrator; when will be vacated*---A sale of lands by an administrator for distribution, under an order of the probate court, by which the administrator was authorized to sell the lands for CASH, and which sale was made on 1st February, 1865, and the lands bid off for \$18,120 00, and paid for in Confederate treasury-notes, will be vacated on application to have the sale confirmed, when it appears that the lands sold, at the time of the sale, were worth \$8,000 in gold, and the Confederate currency thus paid for it by the purchaser, was not worth much over \$346 00. *Kitchell, Adm'r, v. Jackson et al., Adm'rs.*..... 302
6. *Cash; meaning of, as used in the statute.*---The word *cash*, in such an order, and in the statute, means a legal tender currency or its equivalent.---*S. C.*..... 302
7. *Decedent's lands, sale of, under order of probate court; promissory note given to secure purchase-money of, what defense can not be set up against.*---In an action of debt on a promissory note, for "dollars," given to secure the purchase-money of lands of a decedent, sold in this State, in the year 1863, under an order of the probate court for the payment of debts, it can not be shown in defense, after the return and confirmation of the sale in the probate court, that the sale was for Confederate treasury-notes, and not for "dollars," in some lawful currency of the United States. (SAFFOLD, J., *dissenting.*)---*Hill, Adm'r, v. Erwin.*..... 661
8. *"Dollars;" meaning of.*---If such a sale is permitted to stand, the word "dollars" in such note must be construed to mean such

## CONFEDERATE MONEY—CONTINUED.

- dollars as would be a legal tender in payment of debts. (SAFFOLD, J., *dissenting*.)—*S. C.*..... 661
9. *Confederate treasury-notes; note for loan of, void.*—A promissory note given by one citizen of this State to another, during the late insurrection, and payable in this State for a loan of Confederate treasury-notes, is illegal and void.—*Lawson v. Miller*..... 616
10. *Same.*—A promissory note made in this State, since the suppression of the late rebellion, in renewal of such a note, is also illegal and void, and no action can be maintained thereon. (Ordinance 38, Convention 1867.)—*S. C.*..... 616
11. *Credit, allowance of; when error.*—It is error on the final settlement of an executor, to allow him items of credit for funds on hand, unless such funds, or the value of the property of the estate converted into such funds, have been charged to him as assets of the estate in his hands.—*Pitts v. Singleton et al.*..... 363
12. *Worthless assets; when credit may be allowed for.*—Where funds, which came legally into the hands of the executor, have become worthless without fault on his part, he may on proof of that fact leave the same out of his account altogether; or, if they are charged to him, he may have a corresponding credit allowed.—*S. C.* 363
13. *Executor, liability of; for converting property into Confederate funds.*—An executor is a trustee, and can not change the property of the estate received by him into other funds without authority of law. If he so changes the property in his hands into Confederate notes and bonds, without authority of law, he must suffer the loss, and it is error to allow him on final settlement a credit for such funds, which have become worthless, unless, perhaps, where the same was directed by the will.—*S. C.*..... 363

## CONFEDERATE GOVERNMENT.

1. *Judgments rendered during the war, by rebel courts; effect of.*—Judgments rendered by the courts of the rebel government of this State, during the rebellion, created no liens upon the property of the defendants to such judgments, which, in the absence of legislation, can be recognized and enforced by the courts of the present State government.—*Martin v. Hewitt*..... 418
2. *Same.*—Such judgments can stand upon no higher grounds than foreign judgments, and constitute mere causes of action, and can only be enforced by the law of comity, and in actions brought for that purpose. The justice of such judgments may be impeached, and it may be shown that they were irregularly or unduly obtained.—*S. C.*..... 418
3. *Distribution of money collected on fi. fa.; what judgments have a preference.*—On a motion to distribute a sum of money collected by the sheriff on *fi. fa.*, on several judgments, some of which were rendered in a circuit court of this State before the 11th day of January, 1861, and others rendered in the courts of the rebel State government, the judgments of the rebel courts will be postponed in payment to the judgments rendered by the courts of the State before secession.—*Noble & Bro. et al. v. S. Cullom & Co. et als.*..... 554



CONFEDERATE GOVERNMENT—CONTINUED.

4. *Quere.*—Are not judgments of the rebel courts, rendered in this State during the supremacy of the rebellion, mere nullities?—(Per PETERS, J.)—S. C. .... 554
5. *Persons holding office, after passage of ordinances 3 and 10 of convention of 1861, how regarded.*—All persons holding office in this State, after the overthrow of the rightful government thereof, by the late rebellion, and after the passage of the ordinances Nos. 3 and 10 of the convention of 1861, are to be regarded as persons holding office under the insurrectionary organization, then having military control of the territory of the State.—S. C. .... 554
6. *Same; judgments of courts of insurrectionary organization, how regarded.*—This insurrectionary organization was erected in defiance of the public policy and constitution of the United States, and the judgments of its judicial tribunals are not such as this court, in the absence of legislative enactments, has authority to recognize and enforce, except, perhaps, as the decrees of foreign courts. (Chief-Justice, *arguendo* in *Martin v. Hewitt.*)—S. C. .... 554
7. *Same; what not made valid by.*—The judgments of the courts of the so-called Confederate government, erected in this State during the supremacy of the late rebellion, were not ratified and made valid by operation of the reconstruction acts of congress.—S. C. .... 554
8. [SAFFOLD, J., *dissenting, held*—In cases of successful or subdued rebellion, or when one independent nation succumbs to another, the courts of the conquering government, in the absence of positive legislation, are bound to recognize the rights and obligations of the vanquished people between themselves, as prescribed and determined by their local laws and tribunals, except so far as they militate against the laws and institutions of their own country. 2. In a practical sense, the people and the government of Alabama, before, during, and since the rebellion, are identical. The participators in the rebellion were alone amenable. Their ordinance of secession was simply void. 3. The laws and judicial decisions of the rebel government of Alabama have been expressly validated by the legal State government, except so far as they were in violation of the constitution and laws of the Union, or of the State.]—S. C. .... 554

COURT, SUPREME.

1. *Adjournment of court, record of proceedings after; what can not be brought to supreme court on certiorari.*—The record of proceedings, in the court below, after its final adjournment, and after appeal to the supreme court, except an amendment of the record of the entry of the judgment *nunc pro tunc*, or of some of the proceedings antecedent thereto, can not be brought up to this court, upon the return of a *certiorari* sent down to the court below, upon a suggestion in this court of a diminution of the record. *Monterallo Coal Mining Co. v. Reynolds.* .... 252
2. *Same; what can be brought to this court on appeal.*—Only the record

## COURT, SUPREME—CONTINUED.

- up to the final judgment, including the record of the final judgment itself, can be brought to this court on appeal from such final judgment. What happens after the final judgment, in the court below, except a correction *nunc pro tunc* of the judgment, or other proceedings antecedent to the judgment, is no part of the record upon which errors can be assigned in this court, on an appeal from such final judgment.—*S. C.* ..... 252
3. *Certiorari; when resort may be had directly to supreme court.*—If the decree or other proceeding sought to be revised, occurs in a court from which an appeal may be taken to this court, or before a judge or court equal in authority and jurisdiction to any other inferior judicial tribunal, resort may be had directly to this court for the exercise of its powers of general superintendence and control of inferior jurisdictions.—(PECK, C. J., *dissenting.*)—*S. C.* ..... 261
4. *Original jurisdiction of supreme court and powers conferred by constitution, how used.*—The application in this case is for *mandamus*, and invokes an exercise of the original and separate powers of this court for the control of inferior jurisdictions. In such a case, the court acts under its own discretion, guided by the purposes of law and justice, and it will control by its process all the officers of the inferior courts, with the judgments of which it is asked to interfere. This process the court will construct as it may think wisest, under the purposes of the high powers with which it is clothed by the people by a constitutional grant.—*Ex parte Bibb* ..... 140

## COURT, CIRCUIT.

1. *Courts, final adjournment of; power over judgments, after.*—After the final adjournment of a court, its judgments pass beyond its power and control, and become absolute, except for the purpose of correcting clerical errors and misprisions, where there is upon the record matter apparent enough to make such corrections, &c.; and no new trial can be granted, in such a case, at a subsequent term of the court.—*Ex Parte Sims, Ex'r.* ..... 248
2. *Circuit court; jurisdiction of.*—The circuit court, neither in vacation nor in term time, hath any power to grant a new trial, on the application of the defendant, in a cause which has been affirmed in this court, on his appeal.—*Lapsley v. Weaver* ..... 131

## COURT, COMMISSIONERS.

1. *Commissioners court; what has not jurisdiction of.*—The commissioners court has no jurisdiction to declare the office of tax collector vacant. Its appointment of a person to the office, when there was no vacancy, is void.—*State ex rel. v. Falconer* ..... 696

## COURT, PROBATE.

1. *Executor, final settlement of; what order probate court has not jurisdiction to make.*—After a final settlement of an executor's accounts,

COURT, PROBATE—CONTINUED.

- the probate court has no jurisdiction to entertain a petition, by a distributee, to complete a decree rendered against the executor on partial settlement, and to issue execution upon it.—*Horn, Ex'r, v. Bryan et al.* ..... 88
2. *Application for dower; when probate judge must decline jurisdiction.*—When the lands have been aliened by the husband, and the wife has not relinquished her dower, then if an assignment can not be made by *mees and bounds, without injustice*, the judge of probate must decline jurisdiction, and the application must be made to the court of chancery.—*Snodgrass v. Clark* ..... 198
3. *Probate court; what jurisdiction has.*—The probate court has jurisdiction to make the assignee in bankruptcy of an executor, who has been removed, a party to the proceedings on the final settlement of the executor's accounts, and to render a decree in his favor for any balance that may be found due to the executor from the estate.—*Appling v. Bailey, Assignee* ..... 333
4. *Same; what application has not jurisdiction of.*—If a ward die, and his guardian is appointed administrator of his estate, the probate court in such a case, has no jurisdiction, at the instance of a distributee, to entertain an application to call the guardian to a settlement of his guardianship, for the reason that any decree rendered in such a case, must necessarily be rendered in favor of the guardian, in his character of administrator; and as no judgment or decree can be rendered for, and against the same party, such a judgment or decree, if rendered, is a nullity.—*Carswell v. Spencer* ..... 204
5. *Same; remedy in such case.*—In such a case the remedy is in chancery, where the distributee, on a proper bill filed for that purpose, can make the guardian a party in both characters—as guardian and as administrator—and pray for a final distribution of the estate, by the party as administrator and as guardian on a final accounting and settlement of his guardianship.—*S. C.* ..... 204
6. *Final decree; what has none of properties of, and will not support an appeal*—If such a proceeding be had, in the probate court, after the death of the ward and the appointment of the guardian as administrator, an entry by the court that on auditing the guardian's account, a certain sum is found to be in his hands as guardian, which sum as administrator of the ward's estate he is directed to retain until further order of the court, has none of the properties of a final judgment or decree, and no appeal can be taken on it, and if an appeal be so taken, in such a case, it will be dismissed. *S. C.* ..... 215
7. *Probate court, order of sale by; when can not be collaterally attacked.* Where a probate court grants an order for the sale of personal property of an estate for distribution, if such court obtains jurisdiction by a proper application, and errors afterwards intervene in the proceedings, the order of sale cannot be collaterally impeached for such errors, but will be held valid until reversed, &c., on a proceeding for that purpose; and until such order is so reversed, a charge by a court that a sale made under such an order is void, is erroneous.—*Ward v. Hudspeth* ..... 215



## COURT, PROBATE—CONTINUED.

8. *Decedent, sale of personal property to pay debts; necessity for, a jurisdictional fact, what allegation sufficient.*—The necessity for a sale of the personal property of a decedent, to pay his debts, is a jurisdictional fact; and an application by an administrator for an order to sell certain described personal property, left by his intestate, which alleges that in his opinion, a sale of the property is necessary to pay the debts of the intestate, is sufficient to confer jurisdiction upon the probate court.—*Reynolds, Adm'r, v. Kirkland*... 312

## CORPORATIONS.

1. *Capital stock, unpaid subscription for; what not necessary to sustain judgment against stockholder on garnishment.*—When a subscriber to the capital stock of a corporation is garnished as its debtor, it is not necessary that the stock should have been called for by the company to obtain judgment against him for the amount of his unpaid subscription.—*Curry, Garnishee, v. Woodward*..... 305
2. *Service of process; who may lawfully accept.*—In a suit against a corporation, any officer, agent or employee thereof, on whom the summons and complaint may be executed, is competent to accept the service.—*Talladega Ins. Co. v. Woodward*..... 282
3. *Service of process, acceptance of; what not evidence of.*—An acceptance of service by one as secretary of the corporation, is not of itself sufficient evidence that he bears that relation to the corporation. *S. C.*..... 282
4. *Indorsement, denial of execution of, or authority to make; how only can be taken advantage of.*—Since the adoption of the Code of 1852, an objection to an averment in a complaint against a corporation, that the defendant indorsed a bill of exchange by its president, A. S., involving a denial of the execution of or want of authority to bind by, the indorsement, can only be taken advantage of by plea verified by affidavit.—*Montgomery & Eufaula R. R. v. Trebles*..... 255

## COSTS.

1. *Next friend; when may be taxed with costs.*—A next friend, in whose name the bill of a wife is filed to obtain a divorce, if it be dismissed, may properly be decreed to pay the cost—*S. C.*..... 699

## CONSTITUTIONAL LAW.

1. *Jeopardy; section 3945 of Revised Code; constitutionality of.*—Section 3945 of the Revised Code is not void for want of conformity to the constitution of this State. (*Adhering to the decision in Hill v. The State*, at June term, 1869.)—*Grogan v. The State*..... 9
2. *Same; word as used in the constitution defined and explained.*—The constitution of this State forbids that any person shall, for the same offense, be twice put in jeopardy of life or limb. The jeopardy here meant is that which arises on the final trial upon a charge for a criminal offense, and it commences as soon as the parties are at issue upon a sufficient indictment, and the case is submitted to the jury for their verdict. After this is done, the State can not enter

CONSTITUTIONAL LAW—CONTINUED.

- a *nolle prosequi* without the consent of the defendant. If this is done, the defendant is entitled to be discharged as upon an acquittal, and this court will so discharge him.—*S. C.* ..... 9
3. *War debts; what are, within the spirit and policy of ordinance No. 37 of the convention of 1867.*—Debts contracted during the war, by a court of county commissioners, for feeding the families of Confederate soldiers, are war debts, within the spirit and policy of ordinance No. 37 of the convention of 1867, and therefore void. They are also void, as debts contracted in violation of the laws and policy of the United States. (*SAFFOLD, J., dissenting.*)—*Bibb & Falkner, Ex'rs, v. Court of Co. Comm'rs.* ..... 119
4. *Statute of limitations; for what length of time suspended in Alabama.* The statute of limitations was suspended in this State from 11th day of January, 1861, to the 21st day of September, 1865; that being the period within which no legal civil courts existed in which the people of this State were compellable to have their causes adjudicated. (*PETERS, J., dissenting.*)—*Coleman v. Holmes.* ..... 124
5. *Confederate treasury-notes, promissory note for loan of; without consideration and void.*—A promissory note given in consideration of Confederate treasury-notes loaned, is without proper consideration and void, notwithstanding the contract was made between citizens of the State, and without any illegal intent. (*PECK, C. J., dissenting.*)—*Hale v. Huston, Sims & Co.* ..... 134
6. *Same; bill of credit within the meaning of constitution of the United States.*—Confederate treasury-notes are not recognized by any law of the State or of the United States as property. Their circulation was adverse to public policy. They were bills of credit emitted by an illegal combination of States in violation of the Federal constitution.—*S. C.* ..... 134
7. *Ordinance No. 38 of convention of 1867, second section of; constitutionality of.*—The second section of ordinance 38 of the State convention of 1867, which ordains "that all bills, bonds, notes or evidence of debt, outstanding and unpaid, given for or in consideration of bonds or treasury-notes of the Confederate States, or notes or bonds of this State, paid and redeemable in the bonds or notes of the Confederate States, are hereby declared null and void, and no action shall be maintained thereon in the courts of this State," is not unconstitutional.—*S. C.* ..... 134
8. *Exempt property, right of debtor to select; what not impaired by.*—Under the State constitution, the right of a debtor to select the property which he will retain as exempted from execution, can not be impaired by the levy of an attachment or execution upon any portion of it, nor by his omission or refusal to tender other property in lieu of that levied on, nor, in this case, by the fact that the debtor had other personal property of greater value than the amount exempted. (*PECK, C. J., dissenting.*)—*Bray & Bros. v. Laird et al.* ..... 295
9. *Section 2661 of Revised Code; constitutionality of.*—Section 2661 of the Revised Code, which requires a return, appearance, and trial term in certain cases, is not unconstitutional.—*Curry v. Reynolds.* 349

## CONSTITUTIONAL LAW—CONTINUED.

10. *Accused; right of, to be present during prosecution.*—In all criminal prosecutions in the courts of this State, the accused has the right to be heard by himself and counsel, or by either, and for this purpose he must be present in court, whenever any action is taken in the prosecution, for the purpose of allowing him to be heard, should he desire it, except when orders are made for a continuance, when accused fails to appear, or of a like character, which are governed by the discretion of the court.—*Ex parte Bryan*..... 402
11. *Judgments rendered during the war, by rebel courts; effect of.*—Judgments rendered by the courts of the rebel government of this State, during the rebellion, created no liens upon the property of the defendants to such judgments, which, in the absence of legislation, can be recognized and enforced by the courts of the present State government.—*Martin v. Hewitt*..... 418
12. *Same.*—Such judgments can stand upon no higher grounds than foreign judgments, and constitute mere causes of action, and can only be enforced by the law of comity, and in actions brought for that purpose. The justice of such judgments may be impeached, and it may be shown that they were irregularly or unduly obtained.—*S. C.*..... 418
13. *“Act to regulate judicial proceedings,” approved Dec. 10, 1861; unconstitutionality of.*—The act of the rebel legislature entitled “An act to regulate judicial proceedings,” approved December 10, 1861, was invalid—1st, because it was in violation of public policy; and 2d, because it impaired the obligation of contracts.—*S. C.*..... 418
14. *Same; no liens created by.*—Said act being unconstitutional and void, the liens created by it could not be preserved or continued in force by subsequent legislation for that purpose.—*S. C.*..... 418
15. *“Act for the protection of bona fide purchasers, for a valuable consideration,” approved Oct. 10, 1868; constitutionality of.*—The act entitled “An act for the protection of bona fide purchasers for a valuable consideration,” approved October 10th, 1868, is not in conflict with section 2 of article 4 of the constitution of this State, which declares that “each law shall contain but one subject, which shall be clearly expressed in its title;” nor is it in conflict with part 1, § 10, art. 1, of the constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.—*S. C.*..... 418
16. *Lien created by mere act of legislation; has none of the properties of a contract.*—A lien created by mere act of legislation has none of the elements or properties of a contract, and, therefore, may be destroyed by an act of legislation.—*S. C.*..... 418
17. *Decree for divorce, assignments of error in relation to; when will be stricken out in this court.*—Assignments of error which question the validity of a decree for divorce from the bonds of matrimony, will not be heard upon appeal to this court, unless the appeal has been taken within three months from the date of the enrollment of such decree; but upon motion in this court such assignments will be stricken out.—Constitution of Ala. 1867, Art. 5, § 30.—*Turner v. Turner*..... 437



CONSTITUTIONAL LAW—CONTINUED.

18. *City of Mobile*; § 2 of ordinance passed 2d day of March, 1866; not in conflict with the constitution of the United States, nor of the State of Alabama.—That part of section 2 of an ordinance of the city of Mobile, passed 2d day of March, 1866, which requires the payment of an annual license of \$500 of "every express company or railroad company, who shall do business in the city of Mobile, and whose business extends beyond the limits of the State," is not in conflict with the constitution of the United States, nor with the constitution of the State of Alabama.—*Osborne v. Mayor, Aldermen, &c., of Mobile*..... 493
19. *Same, license required; not an import or export duty, nor regulation of commerce*.—Such a license tax is not an import or export duty, nor is it a regulation of commerce between the several States, nor between the State and foreign countries.—*S. C.*..... 493
20. *State, power of to levy taxes; to what extends, how limited*.—The power of the State to levy taxes, and impose licenses, extends to every species of property, and to all occupations within the State, except where the power is limited by the constitution of the State. *S. C.*..... 493
21. *Power to tax may be delegated to municipal corporation*.—This power to levy taxes and impose licenses may be transferred to a municipal corporation within the limits of the corporation.—*S. C.* 493
22. "*Mobile School Commissioners*;" charter of, public in its nature, and may be altered or amended by the general assembly.—The board of commissioners, known by the name of "The Mobile School Commissioners," as created by the act of 10th January, 1826, was an irregular quasi corporation, public in its nature, and so continued, under all the legislation in relation thereto, down to the adoption of the present constitution of the State, and, therefore, subject at all times to legislative control.—*Mobile School Commissioners v. Putnam et als.*..... 506
23. *Same; charter of, not a contract protected from impairment by constitution of United States*.—Said corporation was created for public ends and purposes, and not for private benefit or emolument; the corporators had no property in the corporation, nor have they paid to the State any thing amounting to a valuable consideration, for its charter; consequently, no contract existed between it and the State, the obligation of which is protected from impairment by the constitution of the United States.—*S. C.*..... 506
24. *Board of education; power of, over public educational institutions*. The board of education has full legislative powers in reference to the Mobile School Commissioners, and other public educational institutions; and all the public educational institutions of the State are legally under the control and management of the superintendent of public instruction and the board of education.—*S. C.*..... 506
25. "*Mobile School Commissioners*;" power of State over funds of.—Although the State may not have the constitutional power to divert from the purposes of the trust, the funds which have been, and are, from time to time, increased and augmented from the bounties and revenues of the State, it may, nevertheless, in its discre-

## CONSTITUTIONAL LAW—CONTINUED.

- tion, change the administrators of these trust funds, and the manner and mode of its administration.—*S. C.* ..... 506
26. "*Mobile School Commissioners*;" office of, when vacated.—By the act of August 11th, 1868, the offices of the Mobile school commissioners became vacant. The words "other school officers" embraces school commissioners. If the complainants, claiming to be such commissioners, were elected or appointed after that date, they ceased to be such school commissioners, by virtue of the resolutions of the board of education of the 19th day of August, 1869.—*S. C.* ..... 506
27. *Board of education*; "*full legislative powers*" of, what embraces.—The "full legislative powers" vested by the constitution in the "board of education," clothed it with all the powers which the general assembly might have exercised, if legislative power had not been conferred on the "board of education," in reference to the public educational institutions of the State. This power covers the whole field of legislation on this subject, including officers and agents to be employed, the mode and manner of their election or appointment, and their tenure of office; for what causes, and how and by whom removable; their duties and compensation, &c.—*S. C.* ..... 506
28. *Same*; session of, how long may continue.—Under article 6, section 7, of the constitution, the board of education may continue in session twenty business days, not including Sundays; and it does not require that they shall follow in successive order. There is no reason why the board of education may not take a recess, without having the recess counted against it.—*S. C.* ..... 506
29. *Same*; acts of, what will be presumed to sustain.—If necessary to sustain the acts of the board of education, it will be presumed that the session was continued for a longer period than twenty days, "by authority of the governor."—*S. C.* ..... 506
30. *Same*; general acts of, public acts.—The general acts of the board of education are public acts of which the courts will take judicial notice, as of the other public acts of the State, and the same presumptions will be made in their favor.—*S. C.* ..... 506
31. *Same*; what act of, is not a law, in any accurate sense, and does not require approval of governor.—A resolution of the board of education, approving or disapproving the appointment or removal of an officer, is not in any accurate sense a law, but is merely an administrative act, and does not, therefore, require the approval of the governor to give it effect.—*S. C.* ..... 506
33. *Ordinance No. 38 of the convention of 1867, and ordinance No. 39, last part of paragraph 3; unconstitutionality of.*—Not only the 3d section of ordinance 38 of the convention of 1867, concerning the value of contracts, also the last paragraph of section 3 of ordinance No. 39 of said convention, that declares "that all judgments rendered in the courts of this State, against defendants, where the consideration was the purchase-money or hire of a slave or slaves, are hereby declared to be null and void," is unconstitutional and void;

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- they both impair the obligation of contracts.—*Fitzpatrick, Ex'r, v. Hearne*..... 171
33. *State. domestic affairs of; by whom controlled*.—The legal, rightful, legislative power of the State, subject to the constitution and laws of the Union, must control the domestic affairs of the State. This power does not exist in the courts of the State, or in any other department of the State government, except the legislative department.—*Ex Parte Norton & Shields*..... 177
34. *Government de facto, European theory of; how can be engrafted into our laws*.—It is unwise and dangerous to the peace and safety of the people to attempt to incorporate into our system of laws, except by direct enactment, the European theory of *de facto* governments. No authority is due to the acts of any government in the American Union which the people have not freely ordained and established, under the authority of the laws and constitution of the Union.—*S. C.*..... 177
35. *New trials; in what cases can be rightfully authorized*.—The legislative power of the rightful government of the State has the right to authorize the grant of new trials, in judgments rendered in the so-called courts of the insurgent government, existing in this State after the 11th day of January, 1861, and until the complete and full restoration of the loyal, rightful government of the State.—*S. C.*..... 177
36. *Ordinance No. 38 of convention of 1867, section one of; unconstitutionality of*.—Section one, of ordinance 38, adopted by the State convention of 1867, which ordains that "all contracts for the sale of lands which are incomplete by reason of the purchase-money being unpaid, or the title deeds and conveyances being unexecuted, and which sales took place between the 11th day of January, 1861, and the 9th day of May, 1865, unless paid for, or contracted to be paid for, in the legal currency of the United States or property other than slaves, are hereby declared null and void at the option of the parties, or either of them," is unconstitutional, because it impairs the obligation of contracts.—*Roach, Adm'r, v. Gunter et al.* 209
37. *Section 1, article 8, of constitution of Alabama; effect of, on venue of cause in chancery*.—Section 8, of article 6, of the constitution of this State does not confine the venue of a chancery cause to the county of the defendant's residence, or that in which the property, the subject-matter of controversy, is situate. (*PETERS, J., dissenting*).—*Fulmore et al. v. Brady*..... 218
38. *Solicitors elected or appointed under section 17, of article 6, of the constitution; what salary not entitled to*.—Solicitors elected or appointed under the 17th section, of the 6th article of the constitution of Alabama, are not entitled to the annual salaries allowed to solicitors appointed under the Code of Alabama.—*Reynolds, Auditor, v. McAfee, Solicitor*..... 237
39. *Solicitor under Code; office of, abolished by constitution*.—The office of solicitor under the Revised Code of Alabama, is abolished by



## CONSTITUTIONAL LAW—CONTINUED.

- the present constitution of Alabama, and the annual salary attached to that office is abolished with the office.—*S. C.* ..... 237
39. *Act of December 18, 1868, and ordinance No. 33 of convention of 1867; what did not authorize.*—The act of the 17th of December, 1868, entitled "An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned, and to repeal sections 2876 and 2877 of the Revised Code of Alabama," and the third section of an ordinance of the convention of 1867, entitled "An ordinance concerning the value of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves," having been declared unconstitutional and void, give to the courts no jurisdiction or power to grant new trials in the cases therein named. Nor is such power given to the courts by the ordinance of said convention No. 39, except in cases where there is a meritorious defense; and the fact that the contract upon which a judgment is rendered, was given in consideration of slaves bought and sold, constitutes no meritorious defense, provided good faith was observed between the parties in making such contract.—*Ex Parte Sims, Ec'r.* ..... 248
40. *Persons holding office, after passage of ordinances 3 and 10 of convention of 1861, how regarded.*—All persons holding office in this State, after the overthrow of the rightful government thereof, by the late rebellion, and after the passage of the ordinances Nos. 3 and 10 of the convention of 1861, are to be regarded as persons holding office under the insurrectionary organization, then having military control of the territory of the State.—*S. C.* ..... 554
41. *Same; judgments of courts of insurrectionary organization, how regarded.*—This insurrectionary organization was erected in defiance of the public policy and constitution of the United States, and the judgments of its judicial tribunals are not such as this court, in the absence of legislative enactments, has authority to recognize and enforce, except, perhaps, as the decrees of foreign courts. (Chief-Justice, *arguendo* in *Martin v. Hewitt.*)—*S. C.* ..... 554
42. *Act December 28, 1868; constitutionality of.*—The "act to suppress murder, lynching, and assaults and batteries," approved December 28, 1868, is a valid law of this State. It is not obnoxious to the second section of article 5, of the constitution of Alabama; it is upon but one subject matter, though it deals with several branches thereof.—*Gunter v. Dale Co.* ..... 639

## CONTRACT.

1. *Contract with carrier; who may sue in his own name.*—One who has a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement, may support an action, in his own name, on the contract. *So. Exp. Co. v. Caperton.* ..... 101
2. *Quere*—Whether a printed blank receipt, containing restrictions of his responsibility, and to be used generally, filled up by the common carrier and given to a party sending goods, is a special contract?—*S. C.* ..... 101

## CONTRACT—CONTINUED.

3. *Special contract; what, carrier may make.*—Common carriers may reasonably limit their liabilities by special contract; but public policy will not permit common carriers, even by special contract, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves, or their servants.—*S. C.*..... 101
4. *Contract, made during rebellion; what, is void and contrary to public policy.*—A contract made during the late rebellion, to loan or hire mules to a party, known at the time to be engaged in the manufacture of iron for the late Confederate government, with a knowledge on the part of the bailor that said mules are borrowed or hired of him to be employed in the manufacture of iron for said Confederate government, to be used for military purposes in carrying on said rebellion against the United States, is in violation of public policy and void, and no action can be maintained thereon. *Quinchett v. Oxford Iron Co.*..... 487
5. *Same; what does not deprive owner of property of.*—Notwithstanding the illegality of such contract, the owner of the mules, in a proper action, may recover the mules, if in possession of the bailee, or their value if he has converted them to his own use. *S. C.*..... 487
6. *Quere*—Whether, under the evidence in this case, the mules, by the contract of hire, having become lawful subjects of prize and capture, it would not be a good defense to an action for their recovery, that while employed in the unlawful business, they were captured and carried off by the forces of the United States.—*S. C.* 487
7. *Contract; what does not constitute.*—The corporation known as the Mobile School Commissioners was created for public ends and purposes, and not for private benefit or emolument; the corporators had no property in the corporation, nor have they paid to the State any thing amounting to a valuable consideration for its charter; consequently, no contract existed between it and the State, the obligation of which is protected from impairment by the constitution of the United States.—*Mobile School Commissioners v. Putnam et al.*..... 506
8. *Written contract; enticing servant under.*—§ 3691 of the Revised Code of Alabama, prohibiting the enticing of a servant under written contract, is still of force, and is a valid law.—*Murrell v. State.* 367
9. *Same; not in violation of "civil rights bill."*—Said enactment is not in violation of, or in conflict with, the provisions of the law of congress, commonly known as the "civil rights bill." It does not discriminate in favor of, or against, any class of citizens. Any person competent to make written contracts may employ laborers, or may be employed as a laborer, under its protection, without regard to race, color, or condition.—*S. C.*..... 367
10. *Infancy of laborer; what no defense against.*—The infancy of the laborer interfered with is not a good defense for one who violates this law.—*S. C.*..... 367
11. *Same; what contracts affected by.*—To bring a contract for hire within the provisions of this enactment, the whole contract must be in writing. Contracts by parol, although valid without refer-

## CONTRACT—CONTINUED.

ence to this enactment, and binding upon the parties, do not come within the protection of the act.—*S. C.*..... 367

## CRIMINAL LAW.

## I. BIGAMY.

1. *Bigamy; lawful wife not competent witness against husband on trial of.*—In a prosecution for bigamy, the first and true wife can not be admitted to give evidence against her husband.—*Williams v. The State*..... 42
2. *Same; jurisdiction of offense.*—The local jurisdiction of bigamy is in the county where the defendant married or cohabited with the second wife.—*S. C.*..... 42
3. *Marriage, contracted through fear of imprisonment; when not void.* Marriage contracted through fear of imprisonment is not void, when the fear was not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy.—*S. C.*..... 42
4. *Cohabitation; is evidence of what; what can not effect.*—Cohabitation is evidence of marriage, but it can not make a void marriage valid.—*S. C.*..... 42

## II. BURGLARY.

1. *Section 3695 of Revised Code; indictment under, what should show.* An indictment for burglary, under section 3695 of the Revised Code, for breaking into and entering a "shop," should show that the shop is one in which "goods, merchandise or other valuable thing is kept for use, sale, or deposit." To charge that the shop was broken into and entered "with intent to steal," is not enough. *Crawford v. The State*..... 382
2. *Possession of stolen property; explanation of, proper evidence to go to jury.*—One found in possession of a watch alleged to have been taken from a shop by the breaking into and entering the same with intent to steal, may explain his possession, and this explanation may go to the jury, with the proof of possession.—*S. C.*..... 45
3. *Principal and accessories; distinction between abolished.*—In this State, all who in any manner participate in the commission of a burglary, are guilty, without regard to the former distinction of principal and accessories in such offense.—*Wicks v. The State*.... 368
4. *Burglary, indictment for; what sufficient.*—A count in an indictment for burglary, which charges that the accused broke into and entered the store-house of W., "in which goods and merchandise were kept for use, sale or deposit, with intent to steal," is not bad on demurrer, because it is not also alleged that "said goods and merchandise were of any valuable things."—*S. C.*..... 398

## III. CONVICTION,

See SENTENCE.



CRIMINAL LAW—CONTINUED.

IV. DISTILLING WITHOUT LICENSE.

1. *Indictment ; when defective.*—An indictment which charges that the defendant “did distill vinous or spirituous liquors without license and contrary to law,” fails to allege a violation of the revenue act of 1868, requiring a license for engaging in or carrying on certain occupations.—*Johnson v. The State*..... 414
2. *Occupation or vocation ; what necessary to constitute.*—To constitute occupation or vocation, some time during which it is prosecuted is a necessary ingredient. It need not be protracted, but must not be momentary. The intention of the party must govern, and this must be ascertained by the jury.—*S. C.*..... 414

V. ENTICING SERVANTS.

1. *Enticing servant under written contract ; indictment for, when sufficient.*—An indictment under section 3691 of the Revised Code, for enticing servant under written contract, is sufficient if it states the offense in the language of the statute, although the facts which constitute the offense may be charged in the alternative.—*Murrell v. The State*..... 367
2. *Same*—The law in the Revised Code, against “enticing servant under written contract,” is still of force, and is a valid law. It is an enactment of the legislature of Alabama, under the provisional government set up by authority of the United States, and has not been repealed, but continued in force by the recognition of the present rightful government of the State.—*S. C.*..... 367
3. *Same ; not in violation of “civil rights bill.”*—Said enactment is not in violation of, or in conflict with, the provisions of the law of congress, commonly known as the “civil rights bill.” It does not discriminate in favor of, or against, any class of citizens. Any person competent to make written contracts may employ laborers, or may be employed as a laborer, under its protection, without regard to race, color, or condition.—*S. C.*..... 367
4. *Same ; infancy of laborer, what no defense against.*—The infancy of the laborer interfered with is not a good defense for one who violates this law.—*S. C.*..... 367
5. *Same ; what not necessary to conviction.*—In order to convict under this statute, it is not necessary to show that the second or subsequent employer knew at the time of hiring that a previous subsisting contract existed, if, after being properly notified of the previous existing contract, he failed and refused to discharge the laborer, but still kept him in his service.—*S. C.*..... 367
6. *Same ; what contracts effected by.*—To bring a contract for hire within the provisions of this enactment, the whole contract must be in writing. Contracts by parol, although valid without reference to this enactment, and binding upon the parties, do not come within the protection of the act.—*S. C.*..... 367
7. *Same ; rights of parties to contract for labor.*—In such contracts for labor, as in other contracts, the obligation must be mutual, and

## CRIMINAL LAW—CONTINUED.

if such contract be dissolved for any legal reasons, the laborer can make a second contract, without regard to the first.—*S. C.*..... 367

## VI. FORGERY.

1. *Agent; what competent witness to prove.*—The agent of a company to whom application has been made for payment of a forged demand against the company, is a competent witness to prove his agency, in a prosecution for forgery against the person who attempted to collect the money.—*Manaway v. The State.*..... 375
2. *Forged instrument; must be produced or accounted for.*—The instrument alleged to be forged must be produced at the trial, or its absence satisfactorily accounted for.—*S. C.*..... 375
3. *Evidence; what admissible as part of res gestæ.*—Genuine papers of the same kind as the one alleged to be forged, which were presented with it, and taken from the accused at the same time, are part of the *res gestæ*, and admissible as evidence.—*S. C.*..... 375
4. *Mobile Charitable Association, certificate of; what necessary to sustain conviction for forgery of.*—To sustain a charge of forging a certificate of subscription purporting to be made by the Mobile Charitable Association, the first payment of the money required as a condition, precedent to the right of the company to set up a lottery, must be shown. But it is not necessary to show that subsequent payments required have been made.—*S. C.*..... 375

## VII. HABEAS CORPUS.

1. *Application for habeas corpus; oath of facts other than those required by statute, immaterial on.*—On an indictment for perjury, the oath of the accused, that "he is the father and proper custodian of Catharine, or Kate, a colored girl," made upon an application for a writ of *habeas corpus*, to inquire into the imprisonment or restraint of said Catharine, though false, is not enough to sustain a conviction for perjury on said oath. Such oath is immaterial on such application; it is not one of the jurisdictional facts required by statute.—*Gibson v. The State.*..... 17
2. *Habeas corpus; application for writ, how must proceed.*—An applicant for a writ of *habeas corpus* must proceed by petition, which must be signed by the party applying for the writ, or by some person in his behalf; and the petition must be verified by the oath of the applicant, to the effect "that the statements therein contained are true, to the best of his knowledge, information and belief," and if any other statement, than those required by law, be introduced into the petition, they can not, though false, be made matter of substance, so that perjury may be assigned of an oath verifying said petition.—*S. C.*..... 17
3. *Defendant; when will be discharged on reversal.*—If the matter alleged in such petition may be stricken out as immaterial, and there is nothing else of the oath left, the cause will not be remanded, but the defendant will be discharged on reversal.—Revised Code, § 4316.—*S. C.*..... 17

CRIMINAL LAW—CONTINUED.

4. *Murder ; presumption in relation to prisoner accused of an application for bail.*—On an application for bail by a prisoner, who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof.—*Et parte Vaughan*..... 417

VIII. INDICTMENT.

1. *Indictment ; when demurrable.*—A count of the indictment in the following words, viz. : "The grand jury of said county charge that, before the finding of the indictment, Cæsar Williams feloniously took and carried away a certain paper writing, commonly called a cotton receipt, issued by E. M. Byrne & Co., a firm composed of E. M. Byrne and Henry H. Bender, and dated December 4th, 1869, numbered 938, and issued to M. David McDonald for the receipt of one bale of cotton marked [M. D.], and weighing (524) five hundred and twenty-four pounds, of the value of more than one hundred dollars, the property of said M. David McDonald, against the peace and dignity of the State of Alabama," is demurrable, because it is too uncertain whether any value of the property stolen is alleged or not. The allegation of value here may as well apply to the bale of cotton as to the receipt.—*Cæsar Williams v. The State*..... 396
2. *Indictment ; when defective.*—An indictment which charges that the defendant "did distill vinous or spirituous liquors without license and contrary to law," fails to allege a violation of the revenue act of 1868, requiring a license for engaging in or carrying on certain occupations.—*Johnson v. The State* ..... 414
3. *Occupation or vocation ; what necessary to constitute.*—To constitute occupation or vocation, some time during which it is prosecuted is a necessary ingredient. It need not be protracted, but must not be momentary. The intention of the party must govern, and this must be ascertained by the jury.—*S. C.*..... 414
4. *Indictment jointly for same offense ; when no conviction can be had under.*—Where two persons are jointly indicted for the same offense, if the proof shows the commission of the offense severally, by each, there can be no conviction of either or both.—*S. C.*..... 414
5. *Indictment, containing but one count, for malicious injury to a "mare and an ox" ; what proper charge on trial of.*—On the trial of an indictment for malicious mischief, containing but one count for an injury to "a mare and an ox," proven to have been committed at different times, it is error to refuse to charge that "if the State had failed to prove that the mare and ox were injured at the same time, or so near each other as to constitute the same offense, then the defendant is not guilty as charged in the indictment."—*Burgess v. State*..... 190
6. *Same ; when charge must be proved as laid.*—An indictment for malicious mischief should charge such offenses in two counts, or in the alternative in the same count ; or the charge must be proved as laid.—*S. C.*..... 190



## CRIMINAL LAW—CONTINUED.

7. *Indictment under § 3577 of Revised Code; when sufficient.*—An indictment under § 3577 of the Revised Code, for “disclosure of indictment by officer of court or grand juror,” is sufficient if it pursues the form of the statute, and is in form analogous to the forms prescribed in the Revised Code.—*White v. State*..... 409
8. *§ 3577 of Revised Code, deputy sheriff; “officer of court” within meaning of.*—A deputy sheriff is an “officer of court” within the meaning of § 3577 of the Revised Code.—*S. C.*..... 409
9. *Same; what necessary to convict under.*—The intent to disclose must accompany the act of disclosure, in order to justify a conviction under said section. (*SAFFOLD, J., dissenting, held, that there was no error in refusing the second charge, and that the judgment should be affirmed.*)—*S. C.*..... 409
10. *Same; what not necessary to allege in indictment for rape.*—An indictment for rape, under the form given in the Revised Code, is good; it is not necessary to charge that the carnal knowledge of the female was against her will.—*Leoni v. State*..... 110
11. *Accused; right of, to be present during prosecution.*—In all criminal prosecutions in the courts of this State, the accused has the right to be heard by himself and counsel, or by either, and for this purpose he must be present in court, whenever any action is taken in the prosecution, for the purpose of allowing him to be heard, should he desire it, except when orders are made for a continuance, when accused fails to appear, or of a like character, which are governed by the discretion of the court.—*Ex parte Bryan*..... 402
12. *Reversal; what not sufficient cause for.*—The use of the word “charged” in an indictment, instead of the word “charge,” if the indictment is otherwise formal, is not such a defect as will justify a reversal after verdict in the court below, the objection being made for the first time in the supreme court on appeal.—*Brazier v. The State*..... 387

## IX. JEOPARDY.

1. *Jeopardy; word as used in the constitution defined and explained.*—The constitution of this State forbids that any person shall, for the same offense, be twice put in jeopardy of life or limb. The jeopardy here meant is that which arises on the final trial upon a charge for a criminal offense, and it commences as soon as the parties are at issue upon a sufficient indictment, and the case is submitted to the jury for their verdict. After this is done, the State can not enter a *nolle prosequi* without the consent of the defendant. If this is done, the defendant is entitled to be discharged as upon an acquittal, and this court will so discharge him.—*Grogan v. The State*.... 9

## X. LARCENY.

1. *Larceny, indictment for; what charge should be given on trial of.* On the trial of an indictment for grand larceny, where the testimony against the accused is chiefly circumstantial, a charge asked by the prisoner, “that innocence should be presumed until the case

CRIMINAL LAW—CONTINUED.

proved against the prisoner, in all its material circumstances, is beyond any reasonable doubt; and that the evidence ought to be strong and cogent, to find the defendant guilty as charged," is proper and should be given.—*Moorer v. The State*..... 15

XI. LOTTERIES..

1. *Act to regulate; what does not authorize.*—The act to regulate lotteries in this State does not authorize the commissioner of lotteries to issue licenses for the establishment of lotteries, or such enterprises in this State. Lotteries, and enterprises in the nature of lotteries, can only be established by law.—*Eslava v. The State*.... 406
2. *Same; "keno," not within the meaning of.*—The game called "keno," although a game decided by lot or chance, is not a lottery under the act to regulate lotteries; and to bet at it, in this State, is forbidden by statute and is punishable as a crime.—Revised Code, § 3622.—*S. C.*..... 406

XII. MALICIOUS MISCHIEF.

1. *Indictment, containing but one count, for malicious injury to a "mare and an ox;" what proper charge on trial of.*—On the trial of an indictment, for malicious mischief, containing but one count for an injury to "a mare and an ox," proven to have been committed at different times, it is error to refuse to charge that "if the State had failed to prove that the mare and ox were injured at the same time, or so near each other as to constitute the same offense, then the defendant is not guilty, as charged in the indictment."—*Burgess v. The State*..... 190
2. *Same; when charge must be proved as laid.*—An indictment for malicious mischief should charge such offenses in two counts, or in the alternative in the same count; or the charge must be proved as laid.—*S. C.*..... 190
3. *Malicious injury to animals; what essential ingredient of.*—Malice towards the owner is an essential ingredient of the offense of malicious injury to animals.—*Hobson v. The State*..... 380
4. *Same; when malice may be inferred.*—When the injury is unlawfully committed, requisite malice may be inferred from the instrument used, the wantonness of the deed, and any attendant circumstances which would justify the inference in other crimes where malice is a necessary constituent.—*S. C.*..... 380

XIII. MISDEMEANORS.

1. *Misdemeanors; murder, voluntarily to kill one accused of, for flying.* In misdemeanors it will be murder to kill voluntarily the party accused for flying from the arrest, though he can not be otherwise overtaken, and though there be a warrant to apprehend him.—*Williams v. The State*..... 41

## CRIMINAL LAW—CONTINUED.

## XIV. MURDER.

1. *Indictment for ; presumption in relation to prisoner accused of, on application for bail.*—On an application for bail by a prisoner, who is shown to be under indictment for murder, he is presumed to be guilty of the charge in the highest degree, and that presumption must be overcome by proof.—*Ex parte Vaughan*..... 417
2. *Murder ; voluntarily to kill one accused of, for flying.*—In misdemeanors, it will be murder to kill voluntarily the party accused for flying from the arrest, though he can not be otherwise overtaken, and though there be a warrant to apprehend him.—*Williams v. The State*..... 41

## XV. PERJURY.

1. *Application for habeas corpus ; oath of facts other than those required by statute, immaterial on.*—On an indictment for perjury, the oath of the accused, that "he is the father and proper custodian of Catharine, or Kate, a colored girl," made upon an application for a writ of *habeas corpus*, to inquire into the imprisonment or restraint of said Catharine, though false, is not enough to sustain a conviction for perjury on said oath. Such oath is immaterial on such application ; it is not one of the jurisdictional facts required by statute.—*Gibson v. The State*..... 17
2. *Habeas corpus ; application for writ, how must proceed.*—An applicant for a writ of *habeas corpus* must proceed by petition, which must be signed by the party applying for the writ, or by some person in his behalf ; and the petition must be verified by the oath of the applicant, to the effect "that the statements therein contained are true, to the best of his knowledge, information and belief," and if any other statement, than those required by law, be introduced into the petition, they can not, though false, be made matter of substance, so that perjury may be assigned of an oath verifying said petition.—*S. C.*..... 17
3. *Defendant ; when will be discharged on reversal.*—If the matter alleged in such petition may be stricken out as immaterial, and there is nothing else of the oath left, the cause will not be remanded, but the defendant will be discharged on reversal.—Revised Code, § 4316.—*S. C.*..... 17
4. *Perjury ; when one can not be charged on affidavit for attachment.* Perjury can not be charged on an affidavit, made before the clerk of the circuit court for the issuance of an attachment, unless the affidavit asserts the facts required by the statute authorizing the process, and these statutory facts are alleged to be false.—*Hood v. The State*..... 81
5. *Perjury ; definition of.*—Perjury is a corrupt, willful, false oath taken in a judicial proceeding in regard to any matter or thing material to a point involved in the proceeding. The advice of the attorney who prepared the oath and advised the accused to take it, is competent to show what was said and done at the time the oath, alleged to be false, was sworn to, for the purpose of showing an



## CRIMINAL LAW—CONTINUED.

- absence of corrupt intent, or that the accused was misled or mistaken.—*S. C.* ..... 81
6. *Same.*—Generally, an oath to sustain a charge of perjury must not only be untruthful, but it must also be corrupt, unless the statute otherwise directs.—*S. C.* ..... 81

## XVI. RAPE.

1. *Indictment for rape; what need not charge.*—An indictment for rape, under the form in the Revised Code, is good. In such an indictment, it is not necessary to charge that the carnal knowledge of the female was "against her will."—*Leoni v. The State.* ..... 110
2. *Same; what evidence not admissible as evidence of guilt on trial of.*—On the trial of an indictment for rape, it is proper to prove what complaint was made by the prosecutrix, and in support of such proof, the testimony of a witness, to whom complaint was made, as to how, when, where, and what complaint was made, was rightfully admitted; but where the guilt of the accused depended solely upon the evidence of the prosecutrix, the testimony of a witness as to prosecutrix's showing witness a garment with blood and mud upon it, which prosecutrix said was worn by her at the time of the rape, (the witness not knowing any fact about the garment having been worn as stated, nor connecting it with any fact known to the witness as pointing to the guilt of the defendant,) although a part of the complaint, and for that purpose admissible, when so limited, was not evidence of guilt, but mere hearsay, and should have been rejected as proof of guilt.—*S. C.* ..... 110

## XVII. SENTENCE.

1. *Punishment; when leaving to jury to fix, is error.*—When it is made by law the duty of the court to fix the punishment on conviction of an offense, and the court leaves it to the jury to fix such punishment, it is such an error as will work a reversal of the conviction and sentence.—*Leoni v. State.* ..... 110
2. § 3577; *conviction under, what necessary to secure.*—Under an indictment under § 3577 for disclosure of indictment, &c., the intent to disclose must accompany the act of disclosure, in order to justify a conviction under said section.—*White v. State.* ..... 409
3. *Indictment jointly for same offense; when no conviction can be had under.*—Where two persons are jointly indicted for the same offense, if the proof shows the commission of the offense severally, by each, there can be no conviction of either or both.—*Johnson v. The State.* ..... 414
4. *Judgment, motion in arrest of; must be disposed of, in criminal case, before sentence.*—In a criminal case, a motion in arrest of judgment must be finally disposed of—it must be overruled or allowed—before the court proceeds to pronounce sentence against the accused.—*Hood v. State.* ..... 81

## CUSTOM.

1. *Custom, evidence of; what does not constitute requisites of.*—An alleged custom, that has its origin only some three or four years before, is not such a legal custom as will displace the general law. Such an alleged custom must want all the necessary requisites and elements of a good custom. It certainly wanted antiquity, and must also have wanted certainty, consent, obligation, and the other elements of a good custom. Evidence offered, therefore, to prove that at the time of hiring a slave, there was a general, notorious, custom in the neighborhood and county in which said hiring was made, that where the word dollars was used in contracts, and nothing said of the kind of dollars, the parties understood and meant Confederate money, was properly rejected, on motion of the party against whom it was offered.—*Buford et al. v. Tucker*..... 89
2. *Commission merchant; when liable for interest on balance remaining in his hands.*—A commission merchant is liable for interest on a balance in his hands in favor of his principal, in the absence of proof of some contract or usage of trade to the contrary.—*Price Williams & Sons v. McConico*..... 627

## DAMAGES.

1. *Agreement to deliver property, action for damages for breach of when; seizure of, by Confederate officer no defense against.*—T. and U. had a controversy about the ownership of a horse. T. threatened to inform a Confederate officer that it was property of the government, it being branded U. S.; whereupon, U., to find out the Confederate officer's intention in relation to the horse, and not to induce him to seize it, went to see him, and was told by the quartermaster that he would seize the horse. After this, U. informed T. of all that occurred, and T. and U. agreed to arbitrate the matters in dispute, and an award was rendered that T. deliver the horse to U., which was accepted by T. and U.—*Held*, that it was no defense to T., in an action by U. against him on the agreement, that a Confederate quartermaster seized the horse on information gained from U. on his visit to him.—*Toole v. Urquhart*..... 647
2. *Trover and detainue, in action of; value of property, at what time assessed.*—In detainue, as in trover, the jury may assess the value of the property at any time between the demand and the trial.—*Freer et al. v. Cowles et al.*..... 314
3. *Damages for detention; what may be considered, in determining.*—The deterioration of the property from use, in addition to the annual rent or hire, may be considered by the jury in estimating the damages for the detention.—*S. C.*..... 314

## DEED.

1. *Deed, notice of intention to execute; what not notice of.*—Notice of an intention to execute a deed, is not notice of the contents of the deed as executed.—*Ponder v. Scott*..... 241

DEED—CONTINUED.

2. *Same; purchaser, what chargeable with notice of.*—The purchaser is chargeable with notice of every thing that appears on the face of the deeds in the chain of his title, but he is not bound to enquire into collateral circumstances.—*Burch v. Carter*..... 115
3. *Different written instruments; when will be presumed to evidence but a single contract.*—When two instruments of writing are executed on the same day, relate to the same subject-matter, and one refers to the other, the presumption is that they evidence but a single contract.—*Byrne v. Marshall*..... 355
4. *Fee absolute upon condition, &c.; what instrument creates.*—J. being indebted to M., conveyed to him certain real estate in payment, and received from him at the same time a writing, not under seal, nor attested or acknowledged, to which M. bound himself to leave the property under J.'s control and possession for three years, with the privilege of selling any or all of it, and retaining whatever amount he realized by such sale over the valuation placed upon such portion in the sale to M. and the taxes and interest,—*Held*, that M.'s estate in the property was a fee absolute, upon condition of divestiture by a sale by J., within the time specified, and as to a purchaser from J., the latter was to be considered the absolute owner, and that the formalities of the execution of the conveyance attached to the writing.—*S. C.*..... 355

DECLARATION.

SEE EVIDENCE AND ESTOPPEL.

DEVASTAVIT.

SEE EXECUTORS AND ADMINISTRATORS.

DEPOSITIONS.

1. *Deposition, suppression of; when will not be allowed, unless adverse party shows actual injury.*—The suppression of a deposition, on motion of the adverse party, because the witness had been furnished with a copy of the interrogatories, and cross-interrogatories, before the examination by the commissioner, will not be allowed, unless the party complaining shows actual injury to him by such practice. In such a case error will not be presumed.—*Goodrich v. Goodrich*..... 671
2. *Same; English orders and rules of practice; how regarded.*—The English orders and rules of chancery practice, in such cases, are not to be regarded as peremptory, but only "as furnishing proper analogies to regulate the practice" in our courts.—*Chancery Rule 7, Revised Code, p. 824.*—*S. C.*..... 671
3. *Deposition, suppression of; when failure or refusal of witness to answer interrogatories will not be cause for.*—The refusal or failure of a witness to answer a question, addressed to her on an examination before the commissioner, will not be held a sufficient reason to suppress such deposition on motion of the adverse party, when it ap-



## DEPOSITIONS—CONTINUED.

- pears that the interrogatory is sufficiently answered in another portion of the deposition, or that the answer would be immaterial on the trial on the merits of the cause.—*S. C.*..... 671
4. *Deposition; when will be suppressed.*—A deposition, taken on interrogatories, without giving the adverse party the notice required by section 2718 of the Revised Code, will be suppressed, unless it be shown that the party to whom notice is required to be given, under the provision of said section, resides out of, or is absent from, the county. If the adverse party be a corporation, then it must be shown that the domicile or place of business of the body corporate is not in the county, and that it has no officer, or agent or attorney of record, within the county, to whom notice may be given.—*Oxford Iron Co. v. Quinchett.*..... 487
5. *Same; motion to suppress, when in time.*—A motion to suppress a deposition so taken, is in time if made after the parties have announced themselves ready for trial, but before the trial is in fact commenced.—*S. C.*..... 487
6. *Deposition, taking of; when irregular, what will not cure irregularity of.*—It is irregular for the plaintiff to take a deposition in a cause before the defendant is in court, by the service of process on him personally or by the attachment of his estate, or in some other legal way; and such irregularity will not be cured by a subsequent voluntary appearance.—*S. C.*..... 487

## DISCONTINUANCE.

1. *Discontinuance; what will operate as.*—Where several executors or administrators are sued, service of summons on one is sufficient, and a discontinuance, without cause apparent on the record, as to one, will be a discontinuance of the action.—*Huffman, Adm'r, Davison, Gd'n.*..... 273
2. *Discontinuance; what not equivalent to.*—The death of one of several defendants served with process, in action of debt on a bond or note executed by several persons, and the abatement of the suit as to such deceased defendant, does not discontinue the whole action.—*Garrett et al. v. Lynch, Adm'r.*..... 324
3. *Same; definition of.*—A discontinuance is an *unauthorized* dismissal of the suit as to one of several defendants who have been served with process. The death of one of the defendants, and the abatement of the suit as to him, does not have this effect.—*S. C.*..... 324

## DOWER.

1. *Allotment of; jurisdiction of probate judge.*—The judge of probate may cause an assignment of dower to be made, when this can be done by *meles and bounds*, without injustice, whether the lands have been aliened by the husband or not.—*Snodgrass v. Clark.*... 198
2. *Same; when probate judge must decline jurisdiction.*—But when the lands have been aliened by the husband, and the wife has not relinquished her dower, then if an assignment can not be made by *meles and bounds*, without injustice, the judge of probate must de-

## DOWER—CONTINUED.

- cline jurisdiction, and application must be made to the court of chancery.—*S. C.* ..... 198
3. *Improvements on lands; what not sufficient to oust jurisdiction of probate judge.*—Clearing up and putting in cultivation nine or ten acres of land on a tract of 160 acres, and building some houses thereon, is not enough to oust the jurisdiction of the judge of probate, unless it be shown that an assignment of dower, by *metes and bounds*, would be unjust. This court will not presume against the decree of the judge of probate, that such assignment can not be made. There must be clear proof that it would be unjust.—*S. C.* 198
4. *What act barred, in 1840.*—If the wife joined with the husband in a deed in this State, made in 1840, this bars her dower in the land conveyed by such deed.—*S. C.* ..... 198
5. *Bill in chancery; what, not without equity.*—A bill in chancery by the widow to recover the rents of her dower interest from the death of the husband to the assignment of her dower, is not objectionable for want of equity.—*Boyd v. Hunter.* ..... 705
6. *Same; what not multifarious.*—It is not multifarious, because a demand for the rents derived from a lease made by the husband is joined with a claim for rents against the administrators personally, accrued before and after the allotment of dower.—*S. C.* ..... 705
7. *Same; in what suit, heirs of decedent, are not necessary parties defendant.*—The heirs at law of the decedent are not necessary parties defendant with the administrators, to a suit against the latter by the widow for the rents of her dower interest after its assignment.—*S. C.* ..... 705
8. *Same; what not misjoinder of parties.*—Nor is it a misjoinder of parties to unite the tenants of the administrators with them as defendants.—*S. C.* ..... 705
9. *Same; when equity will settle matters of account which are enforceable at law.*—The jurisdiction of equity having attached, that court will complete justice between the parties by settling an account for rent due by the tenants, up to the termination of the defendant's possession, although such rents might be recovered at law.—*S. C.* 705
10. *Administrators, how liable for rents to dowress.*—The administrators, in this case, are liable as such for the rents accrued under the husband's lease, and personally for those arising under the lease made by them.—*S. C.* ..... 705
11. *Administrators, tenants of; how liable to dowress for rents.*—The tenants of the administrators are liable to the dowress for the rents not paid by them at the date of the assignment of dower, and for such as may afterwards accrue during the continuance of their possession.—*S. C.* ..... 705
12. *Estate for years; how effects a title of dower.*—An estate for years interposes no impediment to a title of dower, and if rents be reserved to the use of the husband the widow is entitled, upon endowment, to a proportionate part of such rent.—*S. C.* ..... 705

## ERROR AND APPEAL.

## I. APPEAL—WHEN LIES.

1. *Appeal; what such final judgment as will authorize.*—An order of the circuit court setting aside and annulling a judgment rendered by it at a previous term, and taxing the plaintiff with costs, is such a final judgment as will authorize an appeal to this court.—*Albritton, Guard'n, v. Canterberry et al.*..... 290
2. *Same.*—An order of the circuit court, setting aside and vacating, on motion of the defendant, a judgment rendered at a previous term, is a final judgment upon which an appeal will lie.—*S. C.*.... 290
3. *Same.*—Dismissing a case out of court for want of prosecution, and taxing plaintiff with the costs, is a final judgment which will authorize an appeal to this court.—*S. C.*..... 290

## II. APPEAL—WHEN DOES NOT LIE.

1. *Appeal; when does not lie.*—An order of the circuit court, setting aside a judgment rendered by it at a previous term, and granting a new trial, is not a final judgment, and will not authorize an appeal. *Lawson v. Moore.*..... 274
2. *Same; what not such a final judgment as will support.*—An order of the city court of Montgomery, overruling a motion to set aside an order of said court, made at a previous term thereof, granting a new trial on a judgment of that court under ordinance No. 39 of the convention of 1867, is not a final judgment, upon which an appeal can be taken. An appeal on such an order will be dismissed, on motion of the appellee.—*Hatchett et al. v. Milner et al.*..... 224
3. *Same; what not such final judgment as will authorize.*—The error in granting a new trial at a subsequent term of the court, can not be corrected by an appeal to this court, before final judgment; for the reason, that an order granting a new trial, in such a case, is not a final order or judgment. The remedy to avoid such an error, is an application to this court for a *mandamus* to require the judge or court, making such an order, to vacate and set aside the same. *Ex parte Sims, Ex'r.*..... 248
4. *Same; what can be brought to this court on appeal.*—Only the record up to the final judgment, including the record of the final judgment itself, can be brought to this court on appeal from such final judgment. What happens after the final judgment, in the court below, except a correction *nunc pro tunc* of the judgment, or other proceedings antecedent to the judgment, is no part of the record upon which errors can be assigned in this court, on an appeal from such final judgment.—*Monterallo Coal Mining Co. v. Reynolds.*..... 252
5. *Same; when will be dismissed.*—If the final judgment in the court below is set aside on motion of the appellant, and a new trial granted after the appeal from such final judgment, and whilst the same is pending in this court, although such order of the court below may be erroneous, such appeal will be dismissed on motion of the appellee, in this court, after the grant of such new trial. *S. C.*..... 252



ERROR AND APPEAL—CONTINUED.

6. *Appeal; what not such final order as will authorize.*—Dismissing the levy of an attachment, is not such a final order as will authorize an appeal to this court.—*Bray & Bros. v. Laird*..... 295
7. *Quere* ---Does not an appeal lie from the final order of the judge of probate upon a proceeding of lunacy, as in other cases of the final disposition of a cause?—*Fore v. Fore*..... 478

III. PRACTICE AND PLEADING.

1. *Judgment; when will be reversed and rendered.*---Where the complaint claims damages against an acceptor improperly, and the judgment is for the demand, this court will reverse, and render judgment for the correct amount, at the cost of the appellee.—*Manning v. Kohn*..... 343
2. *Appearance, general; what is not, and can not have effect of.*---An appearance of a defendant by motion to dissolve an attachment is not a general appearance, and can not have the effect of one.—*Moore v. Dickerson*..... 485
3. *Judgment by default, entry of; when will be treated as clerical error.* A judgment entry that the parties came by their attorneys, will be treated as a clerical error on appeal, when the bill of exceptions shows that the defendants made default.—*S. C.*..... 485
4. *Reversal; what not sufficient cause for.*—The use of the word "charged" in an indictment, instead of the word "charge," if the indictment is otherwise formal, is not such a defect as will justify a reversal after verdict in the court below, the objection being made for the first time in the supreme court on appeal.—*Brazier v. The State*..... 387
5. *Same.*—On appeal in a criminal case, the whole record is to be looked to in order to enable the supreme court to make up its judgment; and if the whole record so explains itself as to make all the parts consistent, a cause will not be reversed because it appears that the accused was indicted by the name of *Henderson Brazier*, but applied for and obtained a removal of the trial in the name of *John H. Brazier*, when the judgment itself shows that *Henderson Brazier* and *John H. Brazier* are the same person, no objection or exception being made in the court below.—*S. C.*..... 387
6. *Submission of cause; when will not be set aside.*—After assignment and joinder in error, and the submission of a cause in this court, the revoking of the order of submission is a matter of grace, resting within the discretion of the court. A motion to set aside the order of submission by one of the parties in a cause, will not be granted, when it may work injustice to the other parties.—*Noble & Bro. et al. v. Cullom & Co. et al*..... 554
7. *Assignment of error; what, excludes irregularities from consideration.* An assignment of error "that the court erred in rendering judgment as shown by the record," without any other assignment, excludes from consideration any mere irregularities in the proceedings.—*Curry, Garnishee, v. Woodward*..... 305

## ERROR AND APPEAL—CONTINUED.

8. *Complaint, defects in; how can not be taken advantage of.*—When the complaint shows a substantial cause of action, its defects, which would have been available on demurrer, can not be taken advantage of on error, when the parties were present in the court below, and failed to make the objection there.—*Watson et al. vs. Knight*..... 352
9. *Objection; what can not be made for the first time in this court, by party appearing in court below.*—In a proceeding under the Revised Code, to erect or raise a dam, the objection that less than fifteen days intervened between the filing of the application and the inquest of the jury, can not be raised, for the first time, in this court by a party who appeared in the primary court to contest the application, and there omitted to make the objection.—*Bush v. Robinson*..... 328
10. *Facts, existence of; what sufficient proof of, on appeal.*—When an appeal is taken upon the record merely, without a bill of exceptions, it is sufficient if the existence of a fact, necessary to uphold the judgment of the court below, appear either actually upon the record, or by the determination of the court.—*S. C.*..... 328
11. *Error, what can not be raised for first time in this court.*—The citation to the garnishee in an attachment suit, varied erroneously from the attachment and judgment, in describing the plaintiffs as guardians of two persons instead of one of them only,—*Held*, the error, if one, is amendable, and can not be raised for the first time in this court, the parties having failed to do so in the lower court.—*Price Williams & Sons v. McConico et al., Guardians*..... 627
12. *Judgment; when error to vacate, at a subsequent term.*—It is error for a circuit court, at a subsequent term, on motion of defendant, to vacate a judgment in favor of the plaintiff, and to declare the same null and void, upon the alleged ground that the court had no jurisdiction to render such judgment.—*Ex Parte Morris & Blair*..... 361
13. *Mandamus; when will not be issued.*—Such judgment is a final judgment, upon which an appeal will lie to this court, and a *mandamus*, or rule *nisi* will not be issued requiring the circuit court to set aside and vacate the order and judgment declaring said judgment null and void.—*S. C.*..... 361
14. *Partnership, suit by; when judgment by default is error.*—In a suit by a partnership, in the firm name only, neither the christian nor surnames of the persons comprising the firm appearing in the record, nor aught else in the proceedings by which an amendment might be made, it is error to render judgment by default.—*Landford v. Patton, Donegan & Co.*..... 585
15. *Service of process; who may lawfully accept.*—In a suit against a corporation, any officer, agent or employee thereof, on whom the summons and complaint may be executed, is competent to accept the service.—*Talladega Ins. Co. v. Woodward*..... 287
16. *Service of process, acceptance of; what not evidence of.*—An acceptance of service by one as secretary of the corporation, is not of itself

ERROR AND APPEAL—CONTINUED.

- sufficient evidence that he bears that relation to the corporation.—*S. C.*..... 287
17. *Judgment entry, recital that "service was proven to satisfaction of the court"; how construed.*—A recital in the judgment entry that "service was proven to the satisfaction of the court," will be intended to mean that one who accepted service as secretary of a corporation, was shown by the proof to have been such secretary, in order to sustain the judgment.—*S. C.*..... 287
18. *Executors and administrators; service of process on.*—Where several executors or administrators are sued, service of summons on one is sufficient, and a discontinuance without cause, apparent on the record, as to one will be a discontinuance of the whole action.—*Huff, Adm'r., v. Davison*..... 273

ESTATES OF DECEDENTS.

1. *Statute of non-claim, answer to plea of; when bad on demurrer.*—The answer to a plea of the statute of non-claim, which discloses the fact that a claim or debt against an insolvent estate was not presented to the representative of such estate, within eighteen months after the grant of letters testamentary or of administration on said estate, is bad on demurrer. (PECK, C. J., *dissenting, and holding, that in this case the facts relied on, as a replication to the plea of statute of non-claim, were tantamount either to an actual presentment of the claim, or to a waiver thereof, or to an excuse for not presenting the same*)—*Clark, Adm'r, v. Washington*..... 291
2. *Claim, presentation of; when may be inferred by jury.*—Nevertheless, upon an issue properly made before a jury, the facts relied on as a replication in this case, may warrant a finding of a proper presentation of the claim.—*S. C.*..... 291
3. *Decedent, sale of personal property to pay debts; necessity for, a jurisdictional fact, what allegation sufficient.*—The necessity for a sale of the personal property of a decedent, to pay his debts, is a jurisdictional fact; and an application by an administrator for an order to sell certain described personal property, left by his intestate, which alleges that in his opinion, a sale of the property is necessary to pay the debts of the intestate, is sufficient to confer jurisdiction upon the probate court.—*Reynolds, Adm'r, v. Kirkland*... 312
4. *Affidavit made in Mississippi; what sufficient basis to authorize, on settlement in probate court.*—An affidavit made in the State of Mississippi, before an officer there, authorized to administer such oath, in regard to the correctness and justice of a claim against a decedent's estate in this State, is a sufficient basis to support an amended affidavit in support of such claim, upon the settlement of an insolvent estate in a court of probate in this State.—*Fox v. Lawson, Adm'r.*..... 319
5. *Insolvent estate, claim against; what sufficient filing of.*—A copy of a claim against an insolvent estate, with a proper affidavit, delivered to the probate judge, is a sufficient filing of the claim, under section 2196 of the Revised Code.—*Erwin et al., Ex'rs, v. McGuire et al., Adm'rs*..... 499



## ESTATES OF DECEDENTS—CONTINUED.

6. *Same; verification of; what must be.*—The verification must be legal evidence of a just and subsisting demand.—*S. C.*..... 499
7. *Same; when claim need not be filed.*—It is not necessary to file in the probate court a claim on which suit was brought prior to the declaration of insolvency of the debtor's estate.—*S. C.*..... 499
8. *When children born slaves are entitled to inherit the estate of freedman who died in 1860.*—Children born of slave parents during slavery are entitled to inherit the estate of their father, who died a freedman in this State in the year 1860, when his estate remained in the hands of his administrator up to the date of their emancipation, and was then unclaimed by the State.—*Stikes, Adm'r, v. Swan-son et al.*..... 633
9. *Decedent's lands, sale of, under order of probate court; promissory note given to secure purchase-money of, what defense can not be set up against.*—In an action of debt on a promissory note, for "dollars," given to secure the purchase-money of lands of a decedent, sold in this State, in the year 1863, under an order of the probate court for the payment of debts, it can not be shown in defense, after the return and confirmation of the sale in the probate court, that the sale was for Confederate treasury-notes, and not for "dollars," in some lawful currency of the United States. (*SAFFOLD, J., dissenting.*)—*Hill, Adm'r, v. Erwin*..... 661
10. *"Dollars;" meaning of.*—If such a sale is permitted to stand, the word "dollars" in such note must be construed to mean such dollars as would be a legal tender in payment of debts. (*SAFFOLD, J., dissenting.*)—*S. C.*..... 661
11. *Vendor's lien; what not destroyed by.*—The failure to present the bond, for the balance of the unpaid purchase-money of lands, to the administrator within the time required by law to prevent a bar, does not cut off the vendor's lien; it only cuts off the right of the transferee to participate in the distribution of the estate of the decedent with the other creditors, who have duly presented their claims.—*Mahone v. Haddock et al.*..... 92
12. *Trust estate; liability of, for services rendered at request of trustee.* One rendering services to a trust estate, under the employment of the trustee, has no redress against the trust for the debts thus contracted, except to subject an equitable demand of the trustee to the payment of such debt.—*Wade v. Pope et al.*..... 690
13. *Same; when executrix liable at law as executrix.*—An executrix with power to "carry on" the testator's farm as he did in his life-time, is a trustee; and if the will gives her authority to contract debts for expenses incidental to the management of such estate, she is liable at law for such debts as such executrix. A party having a claim against such executrix can not go into chancery in the first instance to enforce its payment, except to reach equitable assets. *S. C.*..... 690
14. *Same; when executrix not liable as executrix in equity.*—An overseer who has rendered services for such executrix and purchased mules, at her request, for the purpose of carrying on such farm, can not, after suing her and recovering judgment against her in her indi-

ESTATES OF DECEDENTS—CONTINUED.

vidual capacity, go into chancery against her as such executrix, to enforce the payment of such judgment at law.—*S. C.*..... 690

ESTOPPEL.

1. *Estoppel; when set up, what proper inquiry for jury.*—In a suit against warehousemen on cotton receipts for the non-delivery of cotton, the defendant's witnesses testified that the plaintiff, in the presence and hearing of the defendant, declared that he had sold his cotton, a part of which had already been deposited at the warehouse, to another person who was present, and who immediately directed the manager of the warehouse, in the presence and hearing of the plaintiff and defendant, to ship the cotton to his order as he received it, which was accordingly done.—*Held*, that a charge to the jury, that if these facts occurred after the receipts were given for the cotton, the verdict should be for the defendant, but nothing which transpired before could bar the plaintiff's action, was erroneous, and that the proper inquiry for the jury was, whether the declarations and conduct of the plaintiff, under the circumstances, were calculated to, and did, mislead the defendant.—*Abrams, Surv. Part., v. Seale, Adm'r.*..... 297
2. *Same; fraud, under plea of; what evidence inadmissible.*—In a suit for trespass against an officer for selling plaintiff's property on an execution against a third person, the plaintiff is not estopped, because the defendant in execution, in his presence and without objection from him, claimed the property as exempt to himself from execution, when the plaintiff's title to the property had been derived from a purchase from the defendant in execution, and when the judgment might have been a lien on the property, if it had not been exempt to such defendant at the time of the sale. Such evidence, unsupported by any thing more definite, is inadmissible on a plea of fraud.—*Watson et al. v. Knight.*..... 352

EVIDENCE.

ADMISSIBILITY AND RELEVANCY—SUFFICIENCY.

1. *Rape; what evidence not admissible as evidence of guilt on trial of.*—On the trial of an indictment for rape, it is proper to prove what complaint was made by the prosecutrix, and in support of such proof, the testimony of a witness, to whom complaint was made, as to how, when, where, and what complaint was made, was rightfully admitted; but where the guilt of the accused depended solely upon the evidence of the prosecutrix, the testimony of a witness as to prosecutrix's showing witness a garment with blood and mud upon it, which prosecutrix said was worn by her at the time of the rape, (the witness not knowing any fact about the garment having been worn as stated, nor connecting it with any fact known to the witness as pointing to the guilt of the defendant,) although a part of the complaint, and for that purpose admissible, when so limited, was not evidence of guilt, but mere hearsay, and should have been rejected as proof of guilt.—*S. C.*..... 110

## EVIDENCE—CONTINUED.

2. *Absent witness ; written statement of what would testify ; effect and force of.*—The written statement of what an absent witness would testify, if present, when accepted in lieu of the witness, must have the same force, so far as credibility is concerned, as the oral statement of the witness would have.—Rule 16, Rev. Code, p. 821. *Crawford v. State*..... 382
3. *Admissions of what absent witnesses would prove ; effect of.*—When a party, “for the purpose of a trial,” admits that certain absent witnesses, if present, “*would prove the facts stated*,” in an affidavit for a continuance, and which is made a part of the bill of exceptions, the facts so admitted are, to all intents and purposes, the testimony of such witnesses, and for the purposes of the trial, entitled to the same credit as if they had testified in open court. Unless such evidence is impeached or disproved, it must govern the judgment of the court in the same degree as any other testimony. It cannot be disregarded without some legal reason. *Snodgrass v. Clark*..... 199
4. *Same.*—Admissions of what it is stated absent witnesses will swear, made by the plaintiff’s solicitor to obtain a hearing and prevent a continuance, must be held to have the same force as the deposition of such witnesses would be entitled to have if regularly taken by the defendant.—*Hughes v. Hughes*..... 698
5. *Reputation of physician who examined and testified as to wounds inflicted on deceased ; when admissible evidence on trial for manslaughter.* On the trial of a defendant for manslaughter, the reputation of the physician who examined the wound which caused death, and who proved its character and effect to the jury, is not a part of the issue, and is irrelevant evidence on such trial, unless the reputation or capacity of the physician is assailed.—*DePhue v. State*.... 32
6. *Acceptor ; when may be considered indorser, guarantor, or acceptor, supra protest.*—When a bill of exchange exhibits the signature of one to whom it is not directed across its face, and another name in the lower left hand corner where that of the drawee is usually placed, the latter will be deemed the drawee, and the former will be considered the indorser, guarantor, or acceptor, *supra protest*, according to the evidence.—*Walton v. Williams*..... 347
7. *Parol evidence ; when admissible to explain relation of parties to bill.* In such a case parol evidence is admissible to explain the relation of the parties to the bill, when sued on by the payee.—*S. C.* .... 347
8. *Written agreement ; what testimony insufficient to reform.*—A written agreement by the vendor to deliver a lot of cotton to the purchaser at a specified place, after due notice given, fire risk excepted, will not be reformed into one to pay the freight only, when the testimony of the complainant is negatived by that of the defendant, and the only other witness of the complainant testifies that the sale was pending two or three days, and that he did not pay particular attention to what was being said by the parties.—*Arnold v. Fowler*..... 167
9. *Bill of exchange ; what evidence error to exclude under plea of non assumpsit, &c.*—On the trial of an action by the indorsee against



EVIDENCE—CONTINUED.

the indorser of a bill of exchange, the plea being *non assumpsit*, with leave to give in evidence any matter that may be a defense to the action, if the court excludes evidence, which, with other evidence that is admitted, tends to show that the defendant has a good defense for the reason that the plaintiff, as to him, is not a *bona fide* holder of the bill, for value, it is an error for which the judgment will be reversed and the cause remanded.—*Battle v. Weems*..... 105

10. *Evidence ; what admissible as part of res gestæ*.—Genuine papers of the same kind as the one alleged to be forged, which were presented with it, and taken from the accused at the same time, are part of the *res gestæ*, and admissible as evidence.—*Manaway v. State*..... 375
11. *Different written instruments ; when will be presumed to evidence but a single contract*.—When two instruments of writing are executed on the same day, relate to the same subject-matter, and one refers to the other, the presumption is that they evidence but a single contract.—*Byrne v. Marshall* ..... 355
12. *Charge to jury ; what should be given, on trial of defendant, where the evidence is chiefly circumstantial*.—On the trial of an indictment for grand larceny, where the testimony against the accused is chiefly circumstantial, a charge asked by the prisoner, that "innocence should be presumed, until the case proved against the prisoner, in all its material circumstances, is beyond any reasonable doubt ; and that the evidence ought to be strong and cogent, to find the defendant guilty as charged," is proper, and should be given.—*Moorer v. The State*..... 15
13. *Forged instrument ; must be produced or accounted for*.—The instrument alleged to be forged must be produced at the trial, or its absence satisfactorily accounted for.—*Manaway v. State*..... 375
14. *Bigamy ; lawful wife not competent witness against husband on trial for*.—In a prosecution for bigamy, the first and true wife can not be admitted to give evidence against her husband.—*Williams v. The State*..... 24
15. *Cohabitation ; is evidence of what ; what cannot effect*.—Cohabitation is evidence of marriage, but it can not make a void marriage valid.—*S. C.*..... 24
16. *Estoppel ; fraud, under plea of ; what evidence inadmissible*.—In a suit for trespass against an officer for selling plaintiff's property on an execution against a third person, the plaintiff is not estopped because the defendant in execution, in his presence and without objection from him, claimed the property as exempt to himself from execution, when the plaintiff's title to the property had been derived from a purchase from the defendant in execution, and when the judgment might have been a lien on the property, if it had not been exempt to such defendant at the time of the sale. Such evidence, unsupported by any thing more definite, is inadmissible under a plea of fraud.—*Watson et al. v. Knight*..... 352
17. *Conviction ; when irrelevant evidence will reverse*.—Under a general charge by the court, which rests the conviction on *all* the evidence

## EVIDENCE—CONTINUED.

delivered before the jury, relevant or irrelevant, the conviction will be reversed, unless it appears from the record, that no conviction could be had otherwise than one which was certainly correct.

*S. C.*..... 35

## ADMISSIONS—DECLARATIONS—RES GESTÆ.

1. *Declarations; proper inquiry for jury, when estoppel is set up.*—In a suit against warehousemen on cotton receipts for the non-delivery of cotton, the defendant's witnesses testified that the plaintiff, in the presence and hearing of the defendant, declared that he had sold his cotton, a part of which had already been deposited at the warehouse, to another person who was present, and who immediately directed the manager of the warehouse, in the presence and hearing of the plaintiff and defendant, to ship the cotton to his order as he received it, which was accordingly done.—*Held*, that a charge to the jury, that if these facts occurred after the receipts were given for the cotton, the verdict should be for the defendant, but nothing which transpired before could bar the plaintiff's action, was erroneous, and that the proper inquiry for the jury was, whether the declarations and conduct of the plaintiff, under the circumstances, were calculated to, and did, mislead the defendant. •  
*Abrams, Surv. Part., v. Seale, Adm'r.*..... 297
2. *Evidence; what admissible as part of res gestæ.*—Genuine papers of the same kind as the one alleged to be forged, which were presented with it, and taken from the accused at the same time, are part of the *res gestæ*, and admissible as evidence.—*Manaway v. State.*..... 375

## EXECUTORS AND ADMINISTRATORS.

1. *Administrator, loan of money by; when a devastavit.*—No law of this State forbids, in terms, an administrator to lend the money of an estate which he represents. In so doing, he may or may not be guilty of a *devastavit*, according to circumstances.—*James et al. v. Johnson. Adm'r.*..... 629
2. *Administrator, contracts made with; in what capacity may sue on.* An administrator may sue in his representative capacity, upon a contract made with him in that character, or he may sue in his individual right.—*S. C.*..... 629
3. *Executor, final settlement of; what order probate court has not jurisdiction to make.*—After a final settlement of an executor's accounts, the probate court has no jurisdiction to entertain a petition, by a distributee, to complete a decree rendered against the executor on partial settlement, and to issue execution upon it.—*Horn, Ex'r, v. Bryan et al.*..... 88
4. *Decedent's papers, promissory note among; presumption of title in whom.*—In an action by executors on a promissory note, found by them among the papers of their testator, and not payable to him, but to a third person, in which the defendants filed a sworn plea that the said note was given and payable to said third person, and

EXECUTORS AND ADMINISTRATORS—CONTINUED.

never indorsed or assigned to plaintiff's testator, and that the plaintiffs had no interest or title in said note, and where the evidence is contradictory—that on the part of the plaintiffs tending to show that the said note had been transferred by the payee, and that on the part of the defendants, that there had been no such transfer, but that the note was still the property of the payee—it is an error, for which the judgment will be reversed and cause remanded, to refuse to give a charge, in writing, asked by the defendants, that the note being payable to a third person, the law presumes him to be the owner until the evidence shows that his title to the note has terminated.—*Turnley et al. v. Black et al., Ex'rs...* 159

5. *Sale of lands by administrator; when will be vacated.*—A sale of lands by an administrator for distribution, under an order of the probate court, by which the administrator was authorized to sell the lands for cash, and which sale was made on 1st February, 1865, and the lands bid off for \$18,120.00, and paid for in Confederate treasury-notes, will be vacated on application to have the sale confirmed, when it appears that the lands sold, at the time of the sale, were worth \$8,000 in gold, and the Confederate currency thus paid for it by the purchaser, was not worth much over \$346.—*Kitchell, Adm'r, v. Jackson et al., Adm'rs.*..... 302

6. *Credit, allowance of; when error.*—It is an error on the final settlement of an executor to allow him items of credit for funds on hand, unless such funds, or the value of the property of the estate converted into such funds, have been charged to him as assets of the estate in his hands.—*Pitts v. Singleton et al.*..... 363

7. *Worthless assets; when credit may be allowed for.*—Where funds, which came legally into the hands of the executor, have become worthless without fault on his part, he may, on proof of that fact, leave the same out of his account altogether; or, if they are charged to him, he may have a corresponding credit allowed.—*S. C.*..... 363

8. *Executor, liability of; for converting property into Confederate funds.* An executor is a trustee, and can not change the property of the estate received by him into other funds without authority of law. If he so changes the property in his hands into Confederate notes and bonds, without authority of law, he must suffer the loss, and it is error to allow him, on final settlement, a credit for such funds, which have become worthless, unless, perhaps, where the same was so directed by the will.—*S. C.*..... 363

9. *Failure to present bond to administrator; effect of.*—The failure to present the bond, for the balance of the unpaid purchase-money, to the administrator within the time required by law to prevent a bar, does not cut off the vendor's lien; it only cuts off the right of the transferee to participate in the distribution of the estate of the decedent with the other creditors, who have duly presented their claims.—*Mahone v. Haddock et al.*..... 92

10. *Administrator, petition by; what sufficient to confer jurisdiction on probate court to order sale of personally.*—The necessity for a sale of the personal property of a decedent, to pay his debts, is a juris-



## EXECUTORS AND ADMINISTRATORS—CONTINUED.

- dictional fact ; and an application by an administrator for an order to sell certain described personal property, left by his intestate, which alleges that in his opinion, a sale of the property is necessary to pay the debts of the intestate, is sufficient to confer jurisdiction upon the probate court.—*Reynolds, Adm'r, v. Kirkland*... 312
11. *Notes given for purchase of decedent's lands, sold under order of probate court ; what liens create, who can not waive.*—Notes given for the purchase-money of a decedent's land sold by the administrator on a credit, in accordance with an order of the probate court for the purpose of paying the debts of deceased, create a lien in favor of the estate of the decedent for the payment of the purchase-money. The administrator has no authority to release such lien until the whole purchase-money is paid.—*Wood et al., Adm'rs, v. Sullens*..... 686
12. *Same ; lien for, may be enforced by administrator de bonis non.*—Such lien may be enforced in equity by the administrator *de bonis non* of the estate of such decedent.—*S. C.*..... 686
13. *Executor ; service on, what sufficient.*—Where several executors or administrators are sued, service of summons on one is sufficient, and a discontinuance, without cause apparent on the record, as to one, will be a discontinuance of the action.—*Huff, Adm'r, Davison, Gd'n*..... 273
14. *Administrator ; what sufficient averment of representative capacity of.*—An averment in a complaint that plaintiff, administrator of J. B., claims of the defendant the amount due on a note payable to his intestate, sufficiently shows that he sues in his representative capacity.—*Rhodes v. Walker*..... 213
15. *Executrix ; when liable at law as executrix.*—An executrix with power to “carry on” the testator's farm as he did in his life-time, is a trustee ; and if the will gives her authority to contract debts for expenses incidental to the management of such estate, she is liable at law for such debts as such executrix. A party having a claim against such executrix can not go into chancery in the first instance to enforce its payment, except to reach equitable assets. *Wade v. Pope et al.*..... 690
16. *Same ; when executrix not liable as executrix in equity.*—An overseer who has rendered services for such executrix and purchased mules, at her request, for the purpose of carrying on such farm, can not, after suing her and recovering judgment against her in her individual capacity, go into chancery against her as such executrix, to enforce the payment of such judgment at law.—*S. C.*..... 690

## FRAUD.

1. *Estoppel ; fraud under plea of ; what evidence inadmissible.*—In a suit for trespass against an officer for selling plaintiff's property on an execution against a third person, the plaintiff is not estopped because the defendant in execution, in his presence and without objection from him, claimed the property as exempt to himself from execution, when the plaintiff's title to the property had been derived from a purchase from the defendant in execution, and when

## FRAUD—CONTINUED.

the judgment might have been a lien on the property, if it had not been exempt to such defendant at the time of the sale. Such evidence, unsupported by any thing more definite, is inadmissible under a plea of fraud.—*Watson et al v. Knight*..... 352

## GIFT.

1. *Gift to wife during coverture ; husband may make, of personal chattel, by parol.*—Under the statutes of this State, the husband may make a valid gift by parol, of personal chattels, to the wife during coverture, and the title vested in her thereby, is good at law, without a resort to equity.—*Goree v. Walthall, Adm'r*..... 161
2. *Same ; what gift is subject to.*—The wife takes such a gift from her husband, subject to the just claims of his creditors existing before the gift, and to all the equities of good faith and fair dealing.—*S. C.*..... 161
3. *Manual delivery ; when not necessary.*—Where the gift consists of a ponderous article, or things not capable of handling, as, for instance, a carriage and horses, there need not be an actual manual delivery of the property to the wife ; but any circumstances amounting to a clear demonstration of the intention of the donor to transfer, and the donee to accept, the property given, and which put it in the power of the donee, or give the donee authority to take possession of the thing given, are enough to complete the right. And these circumstances are to be left to the jury.—*S. C.*..... 161
4. *Voluntary gift or conveyance ; when will be declared void.*—A voluntary conveyance or gift of property made by the father to a son, after the father has been sued for divorce and for permanent alimony, on the grounds of cruelty and adultery, will be declared void when it appears that such conveyance or gift was made to defeat the rights of the wife, and when the son had been properly made a party to the suit for divorce.—*Turner v. Turner*..... 438

## HUSBAND AND WIFE.

1. *Gift to wife during coverture ; husband may make, of personal chattel, by parol.*—Under the statutes of this State, the husband may make a valid gift by parol, of personal chattels, to the wife during coverture, and the title vested in her thereby, is good at law, without a resort to equity.—*Goree v. Walthall, Adm'r*..... 161
2. *Same ; what gift is subject to.*—The wife takes such a gift from her husband, subject to the just claims of his creditors existing before the gift, and to all the equities of good faith and fair dealing.—*S. C.* 161
3. *Manual delivery ; when not necessary.*—Where the gift consists of a ponderous article, or things not capable of handling, as, for instance, a carriage and horses, there need not be an actual manual delivery of the property to the wife ; but any circumstances amounting to a clear demonstration of the intention of the donor to transfer, and the donee to accept, the property given, and which put it in the power of the donee, or give the donee authority to

## HUSBAND AND WIFE—CONTINUED.

- take possession of the thing given, are enough to complete the right. And these circumstances are to be left to the jury.—*S. C.* 161
4. *Husband; when competent witness for wife.*—The husband is a competent witness for his wife to prove what disposition he has made of money belonging to her separate statutory estate.—*Robison et al. v. Robison, pro ami.*..... 227
5. *Resulting trust; what creates, and how may be proved.*—If a husband purchases an estate with money, the corpus of his wife's separate estate, and takes a deed in his own name, a trust results to the wife which may be proved by parol.—*S. C.*..... 227
6. *Same.*—To raise a resulting trust the money advanced must form the consideration of the purchase and be converted into land. A subsequent advance will not suffice.—*S. C.*..... 227
7. *Husband, possession of property by; when will be considered possession of the wife.*—Possession by a husband of property to which a trust in favor of his wife has attached, is the possession of the wife.—*S. C.*..... 227
8. *Marital possession; what amounts to an abandonment of.*—A man who married in this State before 1842, and declined to take marital possession of the wife's estate during his coverture, but left the same under her control, and declared that the same belonged to her and not to him, up to the day of his death in 1862, waived and abandoned his marital rights over her estate.—*Barclay v. Henderson et al.*..... 269
9. *Separate estate by contract; what constitutes.*—A conveyance of property, to a trustee for the sole and separate use of a married woman, free from the debts and claims of her husband, creates in her a separate estate by contract.—*Sprague v. Tyson.*..... 339
10. *Separate estate by contract; how chargeable in equity.*—A married woman, having such a separate estate, may bind it in equity by any contract by which she could bind herself if sole.—*S. C.*..... 339
11. *Husband, domicile of; when not domicile of wife; what change of, will not deprive wife of.*—The wife remaining in this State, after the husband has removed to another State, is not to be deprived of the right to sue the husband, in the court of her domicile, for divorce and alimony, though he may be domiciled in the State of his new home.—*Turner v. Turner.*..... 437
12. *Solicitors of wife, fees of; when allowance of, may be made out of estate of husband.*—In a suit for divorce, in favor of the wife, on the grounds of cruelty and adultery, if it appears that she has no separate property of her own, the wife will be allowed reasonable counsel fees out of the husband's estate, for services actually performed.—*S. C.*..... 437
13. *Bigamy; lawful wife not competent witness against husband on trial for.*—In a prosecution for bigamy, the first and true wife can not be admitted to give evidence against her husband.—*Williams v. The State.*..... 24



## INJUNCTION.

1. *Injunction; when will be dissolved.*—An injunction to restrain the collection of a judgment at law, will be dissolved upon the coming in of the answer of a sole defendant, which denies the allegations of the bill upon which its equity rests.—*Yonge v. Shepperd*..... 315
2. *Same; what complainant must offer.*—A party who asks an injunction to restrain the collection of a judgment, or of an ascertained and admitted debt, secured by mortgage, must pay or tender payment for what he really owes to the respondent in the bill, or show some sufficient cause for his failure to do so.—*S. C.*..... 315
3. *Injunction; dissolution of, before answer of all defendants has come in, when proper.*—Generally, an injunction properly granted should not be dissolved until the answer of all the defendants has come in; this rule is, however, subject to modification and discretion. Where there are more defendants than one, if the defendant, on whom the *gravamen* rests, to whom the facts charged are better known than to the other defendants, and within whose knowledge the facts must be, if they exist at all, has fully answered the bill, section 3438 of the Revised Code will authorize the dissolution of the injunction in vacation, without awaiting the answer of his co-defendants.—*Mobile School Comm'rs v. Putnam et al.*..... 506
4. *Injunction; when will be dissolved.*—An injunction will be dissolved upon the denials of one of the defendants, upon whom the *gravamen* rests, where there are several, and all have answered, if the denials are full and complete.—*Garnett v. Lynch*..... 683
5. *Same; when will be granted.*—A court of chancery will interpose and prevent a sale under an execution in behalf of a *bona fide* purchaser of real estate for a valuable consideration, when the purchase was made after the rendition of the judgment, on which the execution was issued, but before the delivery of an execution upon the judgment to the sheriff of the county where the property is situated.—*Martin v. Hewitt*..... 418

## INTEREST.

1. *Commission merchant; when liable for interest on balance remaining in his hands.*—A commission merchant is liable for interest on a balance in his hands in favor of his principal, in the absence of proof of some contract or usage of trade to the contrary.—*Price Williams & Sons v. McConico et al.*..... 627

## JUDGMENTS.

1. *Judgment, motion in arrest of; must be disposed of, in criminal case, before sentence.*—In a criminal case, a motion in arrest of judgment must be finally disposed of—it must be overruled or allowed—before the court proceeds to pronounce sentence against the accused.—*Hood v. State*..... 81
2. *Plaintiff, character of; recital in judgment entry refers to.*—The recital, in a judgment entry, that the plaintiff recover, &c., refers to the character in which he sues, as set out in the complaint.—*Rhodes v. Walker, Adm'r*..... 213

## JUDGMENT—CONTINUED.

3. *Record; what not part of.*—In a judgment by default, the note which was the cause of action is not a part of the record on appeal.—*S. C.*..... 213
4. *Courts, final adjournment of; power over judgments, after.*—After the final adjournment of a court, its judgments pass beyond its power and control, and become absolute, except for the purpose of correcting clerical errors and misprisions, where there is upon the record matter apparent enough to make such corrections, &c.; and no new trial can be granted, in such a case, at a subsequent term of the court.—*Ex parte Sims, Ex'r.*..... 248
5. *Judgment; when error to vacate, at a subsequent term.*—It is error for a circuit court, at a subsequent term, on motion of defendant, to vacate a judgment in favor of the plaintiff, and to declare the same null and void, upon the alleged ground that the court had no jurisdiction to render such judgment.—*Ex Parte Morris & Blair.*..... 361
6. *Judgments, rendered during the war by rebel courts; effect of.*—Judgments rendered by the courts of the rebel government of this State, during the rebellion, created no liens upon the property of the defendants to such judgments, which, in the absence of legislation, can be recognized and enforced by the courts of the present State government.—*Martin v. Hewitt.*..... 419
7. *Same.*—Such judgments can stand upon no higher ground than foreign judgments, and constitute mere causes of action, and can only be enforced by the law of comity, and in actions brought for that purpose. The justice of such judgments may be impeached, and it may be shown that they were irregularly or unduly obtained. *S. C.*..... 419
8. *Chancery, jurisdiction of; what sale will enjoin.*—A court of chancery will interpose and prevent a sale under an execution in behalf of a *bona fide* purchaser of real estate for a valuable consideration, when the purchase was made after the rendition of the judgment, on which the execution was issued, but before the delivery of the execution to the sheriff of the county where the property is situated.—*S. C.*..... 419
9. *Judgment; what must be rendered on certiorari.*—*Certiorari*, unless the statute otherwise directs, brings up the record of the proceedings in the court below, and the appellate court must give judgment on this record. It must affirm or quash the judgment of the inferior tribunal. It cannot reverse the judgment and remand the the cause for a new trial.—*Fore v. Fore.*..... 478
10. *Recital in judgment entry; what refers to.*—The recital, in a judgment entry, that the plaintiff recover, &c., relates to the character in which he sues, as set out in the complaint.—*Rhodes v. Walker, Adm'r.*..... 213
11. *Distribution of money collected on fl. fa.; what judgments have a preference.*—On a motion to distribute a sum of money collected by the sheriff on *fl. fa.* on several judgments, some of which were rendered in a circuit court of this State before the 11th day of January, 1861, and others rendered in the courts of the rebel State,

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- government, the judgments of the rebel courts will be postponed in payment to the judgments rendered by the courts of the State before secession.—*Noble & Bro. et al. v. Cullom & Co. et al.*..... 554
12. *Quere.*—Are not the judgments of the rebel courts, rendered in this State during the supremacy of the rebellion, mere nullities? (Per PETERS, J.)—*S. C.*..... 554
13. *Same; judgments of courts of insurrectionary organization; how regarded.*—This insurrectionary organization was erected in defiance of the public policy and constitution of the United States, and the judgments of its judicial tribunals are not such as this court, in the absence of legislative enactments, has authority to recognize and enforce, except, perhaps, as the decrees of foreign courts. (Chief Justice *arguendo*, in *Martin v. Hewitt.*)—*S. C.*..... 554
14. *Same; what not made valid by.*—The judgments of the courts of the so-called Confederate government, erected in this State during the supremacy of the late rebellion, were not ratified and made valid by the reconstruction acts of congress.—*S. C.*..... 554
15. [SAFFOLD, J., *dissenting, held*—1. In cases of successful or subdued rebellion, or when one independent nation succumbs to another, the courts of the conquering government, in the absence of positive legislation, are bound to recognize the rights and obligations of the vanquished between themselves, as prescribed and determined by their local laws and tribunals, except so far as they militate against the laws and institutions of their own country. 2. In a practical sense, the people and the government of Alabama, before, during, and since the rebellion, are identical. The participants in the rebellion were alone amenable. Their ordinance of secession was simply void. 3. The laws and judicial decisions of the rebel government of Alabama have been expressly validated by the legal State government, except so far as they were in violation of the constitution and laws of the Union, or of the State.]—*S. C.*..... 554
16. *Same; when judgment by default is error.*—In a suit by a partnership, in the firm name only, neither the christian nor surnames of the persons composing the firm appearing in the record, nor aught else in the proceedings by which an amendment might be made, it is error to render judgment by default.—*Lanford v. Patton, Donegan & Co.*..... 585
17. *Judgment, entry of satisfaction of; what not sufficient to authorize as to surety.*—It is no defense for a surety that his judgment creditor merely neglects or refuses to collect his judgment from the principal, though the principal should become insolvent. Although the judgment creditor stipulates with the principal debtor for delay, so long as the agreement is merely voluntary, and not founded on a valuable consideration, the surety is not discharged.—*Buckalew v. Smith et al.*..... 638
18. *Final decree; what has none of properties of, and will not support an appeal.*—If proceeding be had, in the probate court, after the death of the ward and the appointment of his guardian as administrator, an entry by the court that on auditing the guardian's



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account, a certain sum is found to be in his hands as guardian, which sum as administrator of the ward's estate he is directed to retain until the further order of the court, has none of the properties of a final judgment or decree, and no appeal can be taken on it, and if an appeal be so taken, in such a case, it will be dismissed.—*Carswell v. Spencer*..... 205

## JURY AND JURY TRIAL.

1. *Panel; when should be quashed*.—A jury not drawn in strict accordance with the requirements of the statute, should be quashed on motion of the accused. A failure to have the name of each juror written on a separate slip of paper, and drawn as required by the statute, is a fatal irregularity, for which the jury drawn should be quashed.—*Brazier v. The State*..... 387
2. *Juror; witness competent as*.—A juror is not incompetent, because he is a witness in the case.—*Bell v. The State*..... 393
3. *Acquittal; what equivalent to*.—When the jury has been impaneled and sworn, and a sufficient indictment is read and plead to by the defendant, the discharge of the jury for any cause legally insufficient is equivalent to an acquittal.—*S. C.*..... 393
4. *Verdict; what invalid*.—In a criminal case, a verdict rendered by eleven jurors is invalid, notwithstanding the consent of the defendant and the solicitor. Neither the prosecuting officer nor the defendant has authority to consent to such a change in the tribunal.—*S. C.*..... 393
5. *Act of December 28th, 1868, entitled "An act for the protection of agricultural laborers;" unconstitutionality of*—The "Act for the protection of agricultural laborers," approved December 28th, 1868, is unconstitutional, because it does not provide for a trial by jury; there being no provision for such a trial in the act, or by the general law, either in the probate court, or in the circuit court on appeal.—*Thomas et al. v. Bibb et al.*..... 721

## LIEN.

1. *Notes given for purchase of decedent's lands, sold under order of probate court; what liens create, how can not be waived*.—Notes given for the purchase-money of a decedent's land sold by the administrator on a credit, in accordance with an order of the probate court for the purpose of paying the debts of deceased, create a lien in favor of the estate of the decedent for the payment of the purchase-money. The administrator has no authority to release such lien until the whole purchase-money is paid.—*Wood et al. v. Sul-lens*..... 686
2. *Same; lien for, may be enforced by administrator de bonis non*.—Such lien may be enforced in equity by the administrator *de bonis non* of the estate of such decedent.—*S. C.*..... 686
3. *Same; when separate notes, each constitute a lien on whole tract of land*.—In such a case, if an entire tract of land be sold in one

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- body at the same sale, and not by parcels, then the notes given for the purchase-money at such sale, whether they be given by the same parties or by several different parties, in several notes, are each and all invested with the right of lien for the purchase-money upon the whole tract of land sold, until all are paid.—*S. C* 686
4. *Lien created by mere act of legislation ; has none of the properties of a contract.*—A lien created by mere act of legislation has none of the elements or properties of a contract, and, therefore, may be destroyed by an act of legislation.—*Martin v. Hewitt*..... 419
5. *Lien for unpaid purchase-money of land*—M. sold and conveyed by deed, with full warranty of title, in 1852, a tract of land to H. for \$800. Of this sum, \$300 were paid at the making of the deed, leaving a balance of \$500 of the purchase-money unpaid For the payment of this \$500, H. executed his bond to M., of the same date with that of the sale, with this condition : “If the said title (the warranty deed) shall be sustained, and his (M.’s) right to make said deed shall be established, in a suit about to be commenced against me (H.) for said land, so that said title shall be declared a good and lawful title to said land, then the above bond shall be of full force against me (H.) for the payment of the money therein specified ; but if such title shall fail, then I (H.) am bound to deliver said deed to M. as cancelled, upon which he (M.) is to deliver up the bond as cancelled.” H. went into possession, under the contract of sale, and died in possession, and his distributees and representatives continued in the possession of the land after H.’s death, up to the filing of the bill, in February, 1862. No suit was ever brought against H. for the land, as was apprehended at the making of the bond, and nothing appeared to threaten the legal sufficiency of the title from M. to H. M. died in Georgia, in 1856, and his widow administered on his estate in that State, and thereafter was married during her administration to E., and E. and his wife, as administrator and administratrix, in Georgia, of M.’s estate, transferred and assigned the bond for \$500 to Mahone, the complainant,—*Held*, that the bond in the possession of Mahone, as transferee, is a lien upon said land for the unpaid purchase-money, and the suit to enforce the same was not prematurely brought.—*Mahone v. Haddock*..... 92
6. *Vendor’s lien ; what not destroyed by.*—The failure to present the bond for the balance of the unpaid purchase-money, to the administrator of a decedent within the time required by law to prevent a bar, does not cut off the vendor’s lien ; it only cuts off the right of the transferee to participate in the distribution of the estate of H. with the other creditors who have duly presented their claims. *S. C.*..... 92
7. *Vendor, lien of ; against whom exists.*—The lien of the vendor, for the purchase-money of real estate, exists against the vendee and against volunteers and purchasers under him, with notice, or having an equitable title only.—*Burch v. Carter et al.*..... 115
8. *Same ; against whom does not exist.*—But the lien does not exist

## LIEN—CONTINUED.

- against purchasers under a conveyance of the legal estate, made *bona fide* for a valuable consideration, without notice, if they have paid the purchase-money.—*S. C.*..... 115
9. *Same; purchaser, what chargeable with notice of.*—The purchaser is chargeable with notice of every thing that appears on the face of the deeds in the chain of his title, but he is not bound to enquire into collateral circumstances.—*S. C.*..... 115
10. *Charge to jury; what not erroneous to refuse.*—There was no error in refusing to charge the jury that a judgment is a lien upon certain property, which may be properly claimed as exempt from execution.—*Watson et al. v. Knight.*..... 352

## LUNACY.

1. *Lunacy, proceedings to determine; what sufficient notice of, to lunatic.*—In proceedings of lunacy the service of the writ of arrest is the only notice to which the lunatic, idiot, or *non compos mentis*, is entitled in order to bring him into court.—*Fore v. Fore.*..... 478
2. *Same, proceedings in; sufficient if statute is followed.*—This proceeding is statutory in this State, and is sufficiently regular if the requirements of the statute are substantially complied with.—*S. C.* 478

## MANDAMUS.

1. *Mandamus; when will be denied.*—An application for a *mandamus* to compel a court of county commissioners in this State to provide a fund, by taxation or otherwise, to pay debts contracted during the late rebellion to feed and support the families of Confederate soldiers, will be denied. (*SAFFOLD, J., dissenting.*)—*Bibb & Falkner, Ex'rs, v. Court of County Commissioners.*..... 119
2. *Same.*—If a county treasurer fails, on demand, to pay a claim which has been duly allowed, filed and registered, as prescribed by law, against such county, when there are funds in the county treasury to pay the same, he and his sureties become liable to a motion and judgment, in the name of the party to whom such claim is payable, for the amount thereof. In such a case, therefore, *mandamus* will not be awarded to compel the payment of such claim, as there is a sufficient remedy by motion or suit on the treasurer's bond.—*Arrington, Solicitor, v. Van Houton, Treasurer.*.. 284
3. *Same.*—*Mandamus* will not be granted to compel the court below to set aside a final judgment, from which an appeal lies.—*Ex parte Morris & Blair.*..... 361
4. *Mandamus; when will not lie.*—A *mandamus* will not lie to compel a judge of the circuit court to set aside an order of continuance of a garnishment for further answer pending in that court, unless, perhaps, the power to continue the cause has been corruptly used.—*S. C.*..... 361
5. *Same.*—While an order of continuance of a garnishment suit in the circuit court remains in force, the supreme court will not grant a *mandamus* to inquire into the propriety, or impropriety, of the



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- refusal of the circuit court to discharge a garnishee upon his uncontested answer in the circuit court, when the cause purports to be continued for further answer.—*Ex parte S. & N. R. R.*..... 654
6. *Same; when will be granted.*—An order of city court overruling a motion to set aside an order granted at a former term, setting aside a judgment and granting a new trial, is not a final judgment from which an appeal will lie. The remedy to avoid such an order is an application to the supreme court for a mandamus to require the court to vacate and set aside the order complained of.—*Hatchett et al. v. Milner et al.*..... 224
- See, also, *Lawson v. Moore*..... 274
7. *Mandamus; when lies.*—A mandamus will be awarded to set aside an order made for a change of venue, in a criminal case, in the absence of the accused.—*Ex parte Bryan*..... 402
8. *Same.*—Mandamus lies from a superior to an inferior court to compel action, but will never direct how it shall act or control its discretion. Where a court has acted, its action can only be revised by the superior court, on appeal or certiorari.—*Appling, Judge, &c., v. Bailey, Assignee*..... 333
9. *Mandamus and quo warranto; when concurrent remedies.*—Mandamus and quo warranto are sometimes concurrent remedies to try the right of contending parties to an office.—*State, Ex rel. v. Falconer*..... 696

## MARRIAGE AND DIVORCE.

1. *Marriage, contracted through fear of imprisonment; when not void.* Marriage contracted through fear of imprisonment is not void, when the fear was not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy.—*Williams v. The State*..... 24
15. *Cohabitation; is evidence of what; what cannot affect.*—Cohabitation is evidence of marriage, but it can not make a void marriage valid.—*S. C.*..... 24
3. *Decree for divorce, assignments of error in relation to; when will be stricken out in this court.*—Assignments of error which question the validity of a decree for divorce from the bonds of matrimony, will not be heard upon appeal to this court, unless the appeal has been taken within three months from the date of the enrollment of such decree; but upon motion in this court such assignments will be stricken out.—*Const. of Ala. 1867, Art. 5, § 30.*—*Turner v. Turner*..... 437
4. *Decree, enrollment of; date of, how fixed.*—The date of the enrollment of the decree for divorce in such a case, is the date of the decree as recorded in the minutes of the court by the register. Revised Code, §§ 641, 725, cl. 4.—*S. C.*..... 437
11. *Husband, domicil of; when not domicil of wife; what change of, will not deprive wife of.*—The wife remaining in this State, after the husband has removed to another State, is not to be deprived of the right to sue the husband, in the court of her domicil, for divorce

## MARRIAGE AND DIVORCE—CONTINUED.

- and alimony, though he may be domiciled in the State of his new home.—*S. C.*..... 437
6. *Condonation, always conditional.*—Condonation is always conditional. A renewal of the acts complained of by the wife, is such a revival of the acts condoned as will justify a divorce for the same. *S. C.*..... 437
7. *Cruelty; what acts of sufficient to authorize divorce.*—Striking the wife in the face, choking her, and pulling her hair, by the husband, are such acts of cruelty as will authorize a divorce in this State. *S. C.*..... 437
8. *Decree for divorce in favor of husband, by court of another State; when no bar to jurisdiction of court to decree relief in suit for divorce by the wife in this State, against the husband.*—A suit for divorce, commenced by the wife in the courts of this State, who is herself resident in this State at the time she sues, is not to be affected by another suit, subsequently commenced by the husband, for a divorce against her in the courts of another State, to which he has removed, and to which the wife did not accompany him, and to which suit the wife was not a party, except by publication, although the husband's suit may be terminated by a decree in his favor against the wife, before her suit against him is terminated here. The jurisdiction of the court of this State, having attached in favor of the wife here, it will continue to be entertained, until its powers are fully enforced in her favor, regardless of the decree in favor of the husband rendered by the court of such other State.—*S. C.*.... 437
9. *Alimony, amount of; what not excessive.*—A permanent allowance to the wife, on a decree for divorce, of the sum of \$30,000, is not too liberal when it appears that there are no children by the marriage, and but three children by a former marriage, who are each sufficiently well provided for, and that the estate of the husband is worth \$100,000.—*S. C.*..... 437
10. *Alimony pendente lite; what not too large.*—An allowance to the wife pending a suit for divorce in her favor of \$800, is not excessive, when it appears that the husband's estate is worth \$100,000. *S. C.*..... 437
11. *Solicitors of wife, fees of; when allowance of, may be made out of estate of husband.*—In a suit for divorce, in favor of the wife, on the grounds of cruelty and adultery, if it appears that she has no separate property of her own, the wife will be allowed reasonable counsel fees out of the husband's estate, for services actually performed.—*S. C.*..... 437
12. *Voluntary gift or conveyance; when will be declared void.*—A voluntary conveyance or gift of property made by the father to a son, after the father has been sued for divorce and for permanent alimony, on the grounds of cruelty and adultery, will be declared void when it appears that such conveyance or gift was made to defeat the rights of the wife, and when the son had been properly made a party to the suit for divorce.—*S. C.*..... 437
13. *Divorce; when will be granted on slight indications of peril to wife.* The christian interpretation of the contract of marriage requires

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that the husband shall love the wife ; that "he shall delight in her as in himself," and when the proofs show that he habitually fails to do this, the courts, upon very slight indications of peril to her of body or health, will interpose for her protection, by divorce.—*Goodrich v. Goodrich*..... 670

14. *Same ; what sufficient evidence of cruelty to justify.*—If the conduct of the husband is shown to be habitually cold, indifferent, rude, harsh, vulgar, obscene, and profane, towards the wife, and she is seen shortly after being with him, in the privacy of the marital relation, in tears, with bruises on her face, lips, and side, of a serious character, and the husband admits, when complained of, that these indications of bad treatment were produced by him, his explanation that they were given in playfulness and jest, and not in anger or in earnest, will not be sufficient to rescue his "conduct" from the construction that these appearances are evidences of legal cruelty, sufficient to justify a divorce in favor of the wife for that cause.—*S. C.*..... 670

15. *Children, custody of ; when should be granted to the mother.*—Upon a dissolution of marriage, by divorce in favor of the wife, if she has possession of the children of the marriage, who are of tender years, two being girls and the other a boy, and it appears that the mother is a woman of polite education, and of an amiable disposition, and virtuous, and if it appears that the father is habitually rude, profane, vulgar, obscene and hypocritical in his conduct, and insulting in his language to females in his household, with some evidences of a tendency to drunkenness, cold and indifferent to his children, and disposed to sell them to their grand-mother "for cash," and denounces them as "damn nasty babies" of whom he is tired—in such a case the children will not be separated, or taken from the care and tuition of the mother.—*S. C.*..... 670

16. *Dwelling-house, &c. ; when wife will be protected in possession of, by injunction.*—If during marriage, the husband conveys or causes to be conveyed to the wife, by deed, a house and lot, in which they then are residing, for the purpose of securing it from confiscation on account of the husband's participation in rebellion, and he received and holds possession of the deed for her, and if he is insolvent or likely to become insolvent, and has received moneys or estate belonging to the wife, as her separate property, of considerable value, under the laws of this State for the protection of married women, upon a dissolution of the marriage by divorce in the wife's favor, she will be protected in her possession of such house and lot, and the furniture therein, by injunction against the husband's claim.—*S. C.*..... 670

17. *Matrimony, dissolution of bonds of, under section 2353 of Revised Code ; what necessary to authorize.*—To authorize a dissolution of the bonds of matrimony under section 2353 of the Revised Code, there must be, on the part of the husband, actual violence committed on the person of the wife, attended with danger to her life or health, or such conduct on his part as shows there is reasonable apprehension of such violence ; and such acts of violence, or such



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- conduct, should be distinctly stated and clearly proved, so as to leave no reasonable doubts on the mind as to the truth of their existence, and of their tendency to endanger the life or health of the wife; and the wife, as a general rule, should be without fault on her part.—*Hughes v. Hughes*..... 698
18. *Evidence; what insufficient to establish charge of cruel treatment and violence.*—The deposition of one witness, the sister of complainant, whose general character is proved to be bad, and who is contradicted as to a material fact by the brother of the defendant, is not sufficient to establish the charge of cruel treatment and violence, committed on the person of the wife, by the husband.—*S. C.*..... 698
19. *Next friend; when may be taxed with cost.*—A next friend, in whose name the bill of a wife is filed to obtain a divorce, if it be dismissed, may properly be decreed to pay the cost.—*S. C.*..... 698
20. *Slaves, marriages between, during slavery; legal effect of.*—The marriages of slaves and of freedmen of color with slave women during the existence of slavery in this State, were not illicit connections, but were legal *quasi* marriages, such as the laws allowed and the church approved.—*Stikes, Adm'r, v. Swanson, et al.*.... 633
21. *Same; children of, not bastards.*—The children of such marriages were not bastards at common law, and there is no law of this State which made them bastards. Upon the emancipation of the children of such marriages, by the results of the late war, and the elevation of these persons to citizenship of this State, their heritable blood was restored, the impediment of slavery which obstructed it before, being thus removed.—*S. C.*..... 633

## MOBILE SCHOOL COMMISSIONERS.

1. *"Mobile School Commissioners;" charter of, public in its nature, and may be altered or amended by the general assembly.*—The board of commissioners, known by the name of "The Mobile School Commissioners," as created by the act of 10th January, 1826, was an irregular *quasi* corporation, public in its nature, and so continued, under all the legislation in relation thereto, down to the adoption of the present constitution of the State, and, therefore, subject at all times to legislative control.—*Mobile School Commissioners v. Putnam et als.*..... 506
2. *Same; charter of, not a contract protected from impairment by constitution of United States.*—Said corporation was created for public ends and purposes, and not for private benefit or emolument; the corporators had no property in the corporation, nor have they paid to the State any thing amounting to a valuable consideration for its charter; consequently, no contract existed between it and the State, the obligation of which is protected from impairment by the constitution of the United States.—*S. C.*..... 506
3. *Board of education; power of, over public educational institutions.* The board of education has full legislative powers in reference to the Mobile School Commissioners, and other public educational in-

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- stitutions ; and all the public educational institutions of the State are legally under the control and management of the superintendent of public instruction and the board of education.—*S. C.*..... 506
4. "*Mobile School Commissioners ;*" *power of State over funds of.*—Although the State may not have the constitutional power to divert from the purposes of the trust, the funds which have been, and are, from time to time, increased and augmented from the bounties and revenues of the State, it may, nevertheless, in its discretion, change the administrators of these trust funds, and the manner and mode of its administration.—*S. C.*..... 506
5. *Injunction ; dissolution of, before answer of all defendants has come in, when proper.*—Generally, an injunction properly granted should not be dissolved until the answer of all the defendants has come in ; this rule is, however, subject to modification and discretion. Where there are more defendants than one, if the defendant, on whom the *gravamen* rests, to whom the facts charged are better known than to the other defendants, and within whose knowledge the facts must be, if they exist at all, has fully answered the bill, section 3438 of the Revised Code will authorize the dissolution of the injunction in vacation, without awaiting the answer of his co-defendants.—*Mobile School Comm'rs v. Putnam et al.*..... 506
6. *School-moneys for Mobile county ; who only is authorized to draw from State treasury.*—Under the present laws of the State, the superintendent of education for Mobile county is the only person authorized to draw from the State treasury, moneys belonging to said county for the use of public schools therein.—*S. C.*..... 506
7. "*Mobile School Commissioners ;*" *office of, when vacated.*—By the act of August 11th, 1868, the offices of the Mobile school commissioners became vacant. The words "other school officers" embraces school commissioners. If the complainants, claiming to be such commissioners, were elected or appointed after that date, they ceased to be such school commissioners, by virtue of the resolutions of the board of education of the 19th day of August, 1869.—*S. C.*..... 506
8. *Board of education ; "full legislative powers" of, what embraces.*—The "full legislative powers" vested by the constitution in the "board of education," clothed it with all the powers which the general assembly might have exercised, if legislative power had not been conferred on the "board of education," in reference to the public educational institutions of the State. This power covers the whole field of legislation on this subject, including officers and agents to be employed, the mode and manner of their election or appointment, and their tenure of office ; for what causes, and how and by whom removable ; their duties and compensation, &c.—*S. C.*..... 506
9. *Same ; session of, how long may continue.*—Under article 6, section 7, of the constitution, the board of education may continue in session twenty business days, not including Sundays ; and it does not require that they shall follow in successive order. There

## MOBILE SCHOOL COMMISSIONERS—CONTINUED.

- is no reason why the board of education may not take a recess, without having the recess counted against it.—*S. C.*..... 506
10. *Same; acts of, what will be presumed to sustain.*—If necessary to sustain the acts of the board of education, it will be presumed that the session was continued for a longer period than twenty days, “by authority of the governor.”—*S. C.*..... 506
11. *Same; general acts of, public acts.*—The general acts of the board of education are public acts of which the courts will take judicial notice, as of the other public acts of the State, and the same presumptions will be made in their favor.—*S. C.*..... 506
12. *Same; what act of, is not a law, in any accurate sense, and does not require approval of governor.*—A resolution of the board of education, approving or disapproving the appointment or removal of an officer, is not in any accurate sense a law, but is merely an administrative act, and does not, therefore, require the approval of the governor to give it effect.—*S. C.*..... 506

## MORTGAGE.

1. *Foreclosure, right of; when barred.*—The right to foreclose, in a case like this, is only barred when a mortgage, for like purpose, would be barred.—*Mahone v. Haddock et al.*..... 92
2. *Mortgage, recitals in; what not notice of.*—A recital in a mortgage that in case of a sale of the property, the proceeds are to be first applied to the payment of the amount secured to be paid by another mortgage on the same premises, is not constructive notice to the mortgagee of the contents of the mortgage referred to, when the mortgages are executed on the same day, and there was an agreement, between the mortgagees and the mortgagor, that the mortgage having priority should contain stipulations different from those actually contained in it, there being no evidence as to which was first executed.—*Ponder et al. v. Scott.*..... 241

## NEW TRIAL.

1. *New trials, grant of; when may be authorized.*—The loyal, rightful, legislative power of the State, may by law authorize the grant of new trials in its own courts, where there was a good and meritorious defense in the first instance.—*Ex parte Bibb.*..... 140
2. *Same; what sufficient ground to support.*—It is sufficient ground to open a judgment of a court of the insurgent government, erected in the State of Alabama, after the suspension of the rightful government which existed prior to the 11th day of January, 1861, and to grant a new trial therein, that such judgment was for a larger sum than might probably be due, and that one of the defendants therein was a Union man before the passage of the ordinance of secession, by the insurgent authorities. Very slight grounds in such case should be sufficient to justify the grant of a new trial. *S. C.*..... 140
3. *New trials; in what cases can be rightfully authorized.*—The legislative power of the rightful government of the State has the right



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- to authorize the grant of new trials, in judgments rendered in the so-called courts of the insurgent government, existing in this State after the 11th day of January, 1861, and until the complete and full restoration of the loyal, rightful government of the State.—*Ex parte Norton & Shields*. . . . . 178
4. *Same; what sufficient cause for granting*.—It is sufficient cause for granting a new trial in a judgment rendered in a court of said insurgent government, that the court which rendered such judgment, was a court created by said insurgent government, and the judge who presided was an officer appointed by said insurgent power; and that the cause of action was the supposed breach of a warranty of soundness of a person sold as a slave in this State, after the 1st day of January, 1863; that the damages in said judgment were ad-measured in Confederate money; that the defendant was a female and widow, and that the so-called court sat within a city of this State, then occupied as a military post by the insurgent soldiery. *S. C.* . . . . . 178
5. *Same; affidavit in support of application for new trial, what notice need not be given in relation to*.—Under ordinance No. 39 of the convention of 1867, and the acts of the legislature, in relation to the granting of new trials, it is not necessary that the parties adversely interested should be notified of the time and place of the taking of the affidavits in support of the application for the grant of a new trial.—*S. C.* . . . . . 178

OFFICE.

1. *Office; failure to do what, does not vacate ipso facto*.—The failure of an officer to file his bond within the time prescribed by law, does not *ipso facto* vacate his office.—*State, ex rel., v. Falconer*. . . . . 696
2. *Commissioners court; what has not jurisdiction of*.—The commissioners court has no jurisdiction to declare the office of tax collector vacant. Its appointment of a person to the office, when there was no vacancy, is void.—*S. C.* . . . . . 696
3. *Act approved October 8th, 1868; what waived*.—The act of the legislature, approved October 8th, 1868, extending the time within which tax collectors should file their official bonds, was a waiver of the right of the State to claim a forfeiture of office against those who had not at that time given bond.—*S. C.* . . . . . 696
4. *Mandamus and quo warranto; when concurrent remedies*.—*Mandamus* and *quo warranto* are sometimes concurrent remedies to try the right of contending parties to an office.—*S. C.* . . . . . 696
5. *Persons holding office, after passage of ordinances 3 and 10 of convention of 1861; how regarded*.—All persons holding office in this State, after the overthrow of the rightful government thereof, by the late rebellion, and after the passage of the ordinances Nos. 3 and 10 of the convention of 1861, are to be regarded as persons holding office under the insurrectionary organization then having military control of the territory of the State.—*Noble & Bro et al. v. Cullom & Co. et al.* . . . . . 554

## PARTNERS AND PARTNERSHIP.

1. *Summons and complaint, acceptance of service of, by one member of firm; how binds firm.*—Acceptance of service of a summons and complaint by one partner in the name of the partnership, is equivalent to service on all in respect to their joint property.—*Bowin & Co. v. Sutherland* ..... 278
2. *Partnership, suits by; what should show.*—In a suit by a partnership, the names of the partners composing the firm should be stated with distinctness.—*Lanford v. Patton, Donegan & Co.* ..... 584
3. *Same; when judgment by default is error.*—In a suit by a partnership, in the firm name only, neither the christian nor surnames of the persons comprising the firm appearing in the record, nor aught else in the proceedings by which an amendment might be made, it is error to render judgment by default.—*S. C.* ..... 585

## PAYMENT.

1. *Confederate money, payment of; when extinguishes debt.*—The acceptance of payment of a debt in Confederate currency, by the owner, in his own right and not in a fiduciary capacity, extinguishes the debt.—*Ponder v. Scott et al.* ..... 241

## PLEADING AND PRACTICE.

See ERROR AND APPEAL, under head of PRACTICE.

## POLICEMEN.

1. *Authority of to arrest, co-extensive with the county.*—The authority of a policeman to make an arrest is not confined to the city or town for which he is appointed, but it is co-extensive with the limits of the county.—*Williams v. The State* ..... 41

## QUO WARRANTO.

SEE MANDAMUS.

## RECORD.

1. *Record; what power courts have over, after final adjournment.*—After the final adjournment of a court it ceases to have any power over its records, other than that incident to all courts of general jurisdiction, of correcting clerical errors, where the record affords matter upon which to base such correction.—*Ex parte Morris & Blair*. 361
2. *Record; what not part of.*—In a judgment by default, the note which was the cause of action is not a part of the record on appeal.—*Rhodes v. Walker, Administrator* ..... 213

## RESTITUTION.

1. *Restitution; when necessary to obtain reversal of decree.*—One who receives and retains the purchase-money of land sold under a decree, can not reverse the decree, if the reversal will divest the title.—*J. F. Davis et al. v. Tennessee Davis et al.* ..... 342

REVENUE LAW.

1. *Dealer in tobacco; word as used in the revenue law, defined.*—A dealer in tobacco, within the meaning of the revenue law—one that is required to take out a license—is a person whose business, occupation, employment or vocation, is to deal in tobacco; in other words, a tobacconist. It is not every one who sells tobacco that is required to take out a license, but only “dealers in tobacco.”—*Carter v. The State*..... 29
2. *Same; what sales of tobacco do not constitute a dealer in tobacco, within the meaning of the revenue law*—One who is engaged in carrying on a general dry-goods business as a merchant, and only has tobacco in small quantities, and *by way of variety*, in his general dry-goods business, sells it by the plug, is not a “dealer in tobacco,” within the sense and meaning of the revenue law, and is not, therefore, required to take out a license for that business. *S. C.*..... 29
3. *Same; intent, of seller how effects his conviction.*—In such a case, the intent of the party is to be considered, and if in *bad faith*, under cover of his other business, and for the purpose of defrauding the revenue, he sells or trades in tobacco, then he should be convicted; otherwise, not.—*S. C.*..... 29
4. *Same; intent, how may be proven, and by whom determined.*—The question of intention may be proven as we prove the intent of a party, where the intent to defraud enters into and is necessary to constitute the offense; and the question of intent should be left to the jury under the evidence, aided by proper instructions from the court.—*S. C.*..... 29
5. *Revised Code; § 435 of, construed.*—Under § 435 of the Revised Code, all persons residing in this State were liable to pay the tax imposed by said section upon their incomes, *from whatever sources derived*, unless such incomes were derived from the gross receipts, gross commissions, or gross profits of such persons, upon whose gross receipts, commissions, or profits, taxes were assessed under the provisions of § 434; and such persons only are embraced within the letter or spirit of the proviso, of said § 435, upon whose gross receipts, commissions, or profits, taxes were assessed under the provisions of § 434.—*Lott, Tax Collector, v. Hubbard*..... 593
6. *Income; what subject to taxation.*—Upon the agreed statement of facts upon which this case was tried, the income of the appellee, derived from the mercantile firm of which he was a member, was “liable to taxation.”—*S. C.*..... 593
7. *Income; what does not exempt from taxation.*—Income derived from an independent source, is not exempted from the income tax imposed by § 435, because it has been applied to the payment of a debt due for real estate, purchased on a credit, and upon which real estate a tax has been assessed and paid for the same period within which such income accrued.—*S. C.*..... 593
8. *Occupations; right of State to tax.*—The State has the right to tax occupations.—*Jones, Judge of Probate, v. Page & Stallworth*..... 657
9. *Revenue act of 31st December, 1868; construction of.*—The revenue act approved December 31st, 1868, requires each lawyer composing



## REVENUE LAW—CONTINUED.

- a firm to pay the price prescribed for lawyers for a license, which entitles him to practice his profession in any county of the State. *S. C.* ..... 657
10. *Same*, section 120 of ; does not confer judicial power on auditor.—Section 120 of that act does not confer upon the auditor any judicial authority. It only makes him, to the extent therein expressed, chief of the revenue department to insure uniformity in the execution of the law throughout the State.—*S. C.* ..... 657

## SEPARATE ESTATE.

See HUSBAND AND WIFE.

## SHERIFF.

1. *Distribution of money collected on fi. fa. ; what judgments have a preference.*—On a motion to distribute a sum of money collected by the sheriff on *fi. fa.* on several judgments, some of which were rendered in a circuit court of this State before the 11th day of January, 1861, and others rendered in the courts of the rebel State government, the judgments of the rebel courts will be postponed in payment to the judgments rendered by the courts of the State before secession.—*Noble & Bro. et al. v. Cullom & Co. et al.* ..... 554
2. *Sheriff, fees of ; what payable by the State.*—Sheriffs in this State are entitled to be paid by warrant on the State treasurer, all fees in criminal cases, except when they are payable by the county, out of any funds administered by the county, whether these funds are general or special ; unless there is a special law to the contrary. *Johnson v. Reynolds, Auditor*... ..... 586
3. *Same ; what law governed as to fees of sheriff in Montgomery county up to 17th February, 1868.*—In the case of the sheriff of Montgomery county, there was such a special statute, (Acts, 1865-6, p. 583,) which was in force up to the adoption of the Revised Code, on the 17th day of February, 1868. After that date the payment of his costs was governed by the act of the general assembly, as found in the Revised Code.—*S. C.* ..... 586
4. *Mandamus ; when lies*—A *mandamus* will be allowed to enforce a claim for such fees in favor of a sheriff.—*S. C.* ..... 586
5. *Sheriff's fees in criminal cases ; when payable by the State.*—The third clause of section 4310 of the Revised Code, provides for payment by the State of the sheriff's fees in criminal cases, except when the defendant has been convicted or a *nolle prosequi* entered, in which case they are payable by the county. Where the costs have been taxed against the prosecutor, or the foreman of the grand jury, there must be a return of execution "no property found."—*McKinney v. Reynolds, Auditor*..... 660

## SLAVES AND SLAVERY.

1. *Promissory note for purchase-money of slaves ; sufficient consideration to support, notwithstanding emancipation proclamation, when con-*

## SLAVES AND SLAVERY—CONTINUED.

- tract of sale was *bona fide*, and made between citizens of the rebel States after the proclamation and before the suppression of the rebellion.—Notwithstanding the proclamation of the president of the United States, of the 1st of January, 1863, known as the emancipation proclamation, there continued an uncertain contingent interest and property in slaves, which was a sufficient consideration to sustain contracts, made in good faith, in the rebel States, and between citizens of the said States, contracting with each other, in relation to that species of property, between the date of said proclamation, and the suppression of the rebellion, or the end of the war—consequently, a sale of slaves, made in good faith, in this State, between citizens thereof, between those periods, is a valid sale, and a promissory note made to secure the purchase-money, is a valid note, supported by a sufficient consideration, and may be recovered upon in the courts of this State. (PETERS, J., *dissenting.*)—*McElvain v. Mudd*..... 48
2. Ordinance No. 38, of convention of 1867, third section of; unconstitutionality of.—The third section of the ordinance, No. 38, of the convention of this State, passed the 6th of December, 1867, entitled "An ordinance concerning the validity of contracts, where the consideration was Confederate bonds or currency, and for the purchase of slaves," is in conflict with article 1, section 10, part 1, of the constitution of the United States, that declares, "No State shall pass any law impairing the obligation of contracts," and is, therefore, unconstitutional and void. (PETERS, J., *dissenting.*)—*S. C.*..... 48
3. Hire of slave, note for; what no defense against.—The fact that a slave, hired for the year, was taken from the possession of the hirer in the spring of the same year by the presence of the Federal army, and not regained, is no defense against a note given on 1st of January, 1865, for the hire of the slave for that year. The hirer is nevertheless bound for the hire of the slave for the entire term for which the contract of hiring was made.—*Buford v. Tucker*, 89
4. Custom, evidence of; what does not constitute requisites of.—An alleged custom, that has its origin only some three or four years before, is not such a legal custom as will displace the general law. Such an alleged custom must want all the necessary requisites and elements of a good custom. It certainly wanted antiquity, and must also have wanted certainty, consent, obligation, and the other elements of a good custom. Evidence offered, therefore, to prove that at the time of hiring a slave, there was a general, notorious, custom in the neighborhood and county in which said hiring was made, that where the word dollars was used in contracts, and nothing said of the kind of dollars, the parties understood and meant Confederate money, was properly rejected, on motion of the party against whom it was offered.—*S. C.*..... 89
5. Hire of slave; what amount hirer entitled to recover, for.—The hirer is only entitled to recover the value of the services of said slave, as a hireling, at the time of the hiring, in lawful money of the United States.—*S. C.*..... 90

## SLAVES AND SLAVERY—CONTINUED.

6. *Warranty of title to slave; what does not protect vendee against.*—Neither a warranty of title, nor a warranty that slaves sold are slaves for life, protects the vendee from the consequences of revolution, or against the abolition of slavery and the emancipation of the slaves by the government, and the loss of the slaves by either event, is no legal breach of such warranties.—*Fitzpatrick, Ex'r, v. Hearne*. . . . . 171
7. *Ordinance No. 38 of the convention of 1867, and ordinance No. 39, last part of paragraph 3; unconstitutionality of.*—Not only the 3d section of ordinance 38 of the convention of 1867, concerning the value of contracts, and for the purchase-money of slaves, is unconstitutional and void, but also the last paragraph of section 3 of ordinance No. 39 of said convention, that declares "that all judgments rendered in the courts of this State, against defendants, where the consideration was the purchase-money or hire of a slave or slaves, are hereby declared to be null and void," is unconstitutional and void; they both impair the obligation of contracts.—*S. C.* . . . . . 171
8. *Failure of consideration; what error to charge as.*—A charge to the jury, in an action on a note given on the sale of slaves, that if the consideration of the note was the price of slaves sold, then there was a failure of consideration, and they must find for the defendant, is erroneous.—*S. C.* . . . . . 171
9. *Ordinances Nos. 38 and 39 of convention of 1867; plea setting up, as defense to action on note given for sale of slaves, bad on demurrer.*—In an action on a note given on the sale of slaves, a plea that sets up the ordinances Nos. 38 and 39 of 1867, is bad on demurrer, because the parts of said ordinances referring to notes given, and judgments rendered on such notes, are unconstitutional and void.—*S. C.* . . . . . 171
10. *Warranty of title, plea that sets up; what is good plea.*—A plea that sets up a warranty of title, and that the slaves sold were slaves for life, to an action on a note given for the price of said slaves, and states that the title failed without the fault of defendant, although inartificial, yet in substance is a good plea, and a demurrer to it should be overruled.—*S. C.* . . . . . 171
11. *Ordinance No. 38 of convention of 1861, section one of; unconstitutionality of.*—Section one, of ordinance 38, adopted by the State convention of 1867, which ordains that "all contracts for the sale of lands which are incomplete by reason of the purchase-money being unpaid, or the title deeds and conveyances being unexecuted, and which sale took place between the 11th day of January, 1861, and the 9th day of May, 1868, unless paid for, or contracted to be paid for, in the legal currency of the United States or property other than slaves, are hereby declared null and void at the option of the parties, or either of them," is unconstitutional, because it impairs the obligation of contracts.—*Roach, Adm'r, v. Gunter et al.* . . . . . 209
12. *Guardian, decree against; what no defense against.*—The fact that the property of a ward was derived from the proceeds of the sale



SLAVES AND SLAVERY—CONTINUED.

- of slaves, is no reason why a decree should not be rendered against the guardian on his final settlement.—*Owens et al v. Grimsley et al.* 359
13. *Slaves, marriages between, during slavery; legal effect of.*—The marriages of slaves and of freedmen of color with slave women during the existence of slavery in this State, were not illicit connections, but were legal *quasi* marriages, such as the laws allowed and the church approved.—*Stikes, Adm'r, v. Swanson, et al.* . . . 633
14. *Same; children of, not bastards.*—The children of such marriages were not bastards at common law, and there is no law of this State which made them bastards. Upon the emancipation of the children of such marriages, by the results of the late war, and the elevation of these persons to citizenship of this State, their heritable blood was restored, the impediment of slavery which obstructed it before, being thus removed.—*S. C.* . . . . . 633
15. *Same; when such children are entitled to inherit the estate of freedman who died in 1860.*—Such children are entitled to inherit the estate of their father, who died a freedman in this State in the year 1860, when his estate remained in the hands of his administrator up to the date of their emancipation, and was then unclaimed by the State.—*S. C.* . . . . . 633

STATUTE OF LIMITATIONS—NON-CLAIM.

1. *Statute of limitations; for what period suspended in this State.*—The statute of limitations was suspended in this State from the 11th day of January, 1861, to the 21st day of September, 1865.—*Fox v. Lawson, Adm'r.* . . . . . 319
2. *Statute of limitations; for what length of time suspended in Alabama.* The statute of limitations was suspended in this State from 11th day of January, 1861, to the 21st day of September, 1865; that being the period within which no legal civil courts existed in which the people of this State were compellable to have their causes adjudicated. (PETERS, J., dissenting.)—*Coleman v. Holmes.* . . . . . 124
3. *Statute of non-claim, answer to plea of; when bad on demurrer.*—The answer to a plea of the statute of non-claim, which discloses the fact that a claim or debt against an insolvent estate was not presented to the representative of such estate, within eighteen months after the grant of letters testamentary or of administration on said estate, is bad on demurrer. (PECK, C. J., dissenting, and holding, that in this case the facts relied on, as a replication to the plea of statute of non-claim, were tantamount either to an actual presentment of the claim, or to a waiver thereof, or to an excuse for not presenting the same) —*Clark, Adm'r, v. Washington.* . . . . . 291
4. *Claim, presentation of; when may be inferred by jury.*—Nevertheless, upon an issue properly made before a jury, the facts relied on as a replication in this case, may warrant a finding of a proper presentation of the claim.—*S. C.* . . . . . 291

## SUMMONS AND COMPLAINT.

1. *Summons and complaint, acceptance of service of, by one mem firm; how binds firm.*---Acceptance of service of a summons complaint by one partner in the name of the partnership, is equivalent to service on all in respect to their joint property.---*Bowin Co. v. Sutherlin* ..... 278
2. *Filing pleas; effect of.*---Filing pleas in defense of an action is a recognition by the defendant of the case as in court, and is a waiver of any defect or irregularity in the service of process.---*S. C.* ..... 278
3. *Acceptance of service, indorsement of agreement on; what, will not preclude defendant from contesting action.*---An indorsement on a summons by the defendant that he consents to a judgment being taken against him at the earliest term of the court at which it can be rendered, when no delay or advantage accrues thereby to the defendant, is without consideration, and will not preclude him from defending the suit, if he revokes his consent before the judgment is rendered.---*S. C.* ..... 278
4. *Branch summons; what not such irregularity in, as will work a discontinuance.*---There being three defendants, L. and B. and H., and H. residing in Jefferson county, and L. and B. residing in Shelby county, suit was brought against all in Jefferson circuit court, and the original summons and complaint was served on H. by the sheriff of Jefferson, and a branch summons issued by the clerk of the circuit court of Jefferson county and sent to Shelby county, and there served on L. and B., and all the summonses are returned to Jefferson circuit court and there made one case, and judgment by default rendered against all the defendants,---*Held*, that such judgment will not be reversed on appeal to this court, because the branch summons does not contain the name of the defendant H., except in the indorsement by the clerk on the branch summons. Such an irregularity, if of any force, is not equivalent to a discontinuance.---*Lewis et al. v. Grace* ..... 307
5. *Complaint, amendment of; presumption in relation to.*---Where a complaint has been amended by striking out a party defendant, it will be presumed to have been rightfully done in the absence of proof to the contrary, apparent on the record.---*Odom v. Shackelford* ..... 331
6. *Complaint, defects in; how can not be taken advantage of.*---When the complaint shows a substantial cause of action, its defects, which would have been available on demurrer, can not be taken advantage of on error, when the parties were present in the court below, and failed to make the objection there.---*Watson et al. vs. Knight* ..... 352

## SURETY.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 18.  
Also, **JUDGMENT**, 18.

## STAMP AND STAMP ACT.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 12.

TAXES, TAX ASSESSOR, TAX COLLECTOR.

- assessor, *duty of, on refusal of tax payer to give in income.*  
 x payer refuse to give in his income to the assessor, it is the  
 of the assessor to ascertain its amount from inquiry or other-  
 to the best of his information and judgment. If in dis-  
 charging this duty, acting in good faith, the assessor fixes the  
 amount of such income at a larger sum than it in fact amounted  
 to, and assessed it at the sum thus ascertained by him, such assess-  
 ment is legal, notwithstanding the mistake ; and the collection of  
 the tax, so assessed by the tax collector, is also legal.—*Lott, Tax*  
*Collector, v. Hubbard* ..... 593
2. *Tax collector; liabilities and duties of.*—The tax collector has no  
 authority to alter or change the assessment of taxes delivered to  
 him to be collected ; he can neither increase nor diminish the tax  
 of any individual. It is the duty of the tax collector to collect the  
 taxes of all persons as he found them stated in the assessment,  
 and in doing this he subjects himself to no liability on account  
 of errors in the assessment. The tax collector is bound to pre-  
 sume that the assessment has been corrected by the court of  
 county commissioners, as provided by § 534 of the Revised Code.  
*S. C.* ..... 593
3. *Commissioners court; what has not jurisdiction of.*—The commis-  
 sioners court has no jurisdiction to declare the office of tax col-  
 lector vacant. Its appointment of a person to the office, when  
 there was no vacancy, is void.—*State, ex rel., v. Falconer* ..... 696

TITLES AND WARRANTY.

1. *Warranty of title, plea that sets up; what is good plea.*—A plea that  
 sets up a warranty of title, and that the slaves sold were slaves for  
 life, to an action on a note given for the price of said slaves, and  
 states that the title failed without the fault of defendant, although  
 inartificial, yet in substance is a good plea, and a demurrer to it  
 should be overruled.—*Fitzpatrick, Ex'r., v. Hearne* ..... 171
2. *Fee absolute upon condition, &c. ; what instrument creates.*—J. being  
 indebted to M., conveyed to him certain real estate in payment,  
 and received from him at the same time a writing, not under seal,  
 nor attested or acknowledged, by which M. bound himself to leave  
 the property under J.'s control and possession for three years, with  
 the privilege of selling any or all of it, and retaining whatever  
 amount he realized by such sale over the valuation placed upon  
 such portion in the sale to M. and the taxes and interest,—*Held*,  
 that M.'s estate in the property was a fee absolute, upon condition  
 of divestiture by a sale by J., within the time specified, and as to  
 a purchaser from J., the latter was to be considered the absolute  
 owner, and that the formalities of the execution of the conveyance  
 attached to the writing.—*Byrne v. Marshall* ..... 355



## TROVER AND DETINUE.

1. *Trover and detinue, in action of; value of property, at what time assessed.*—In detinue, as in trover, the jury may assess the value of the property at any time between the demand and the trial—*Cowles et al. v. Freer* ..... 315

## TRUST AND TRUST ESTATES.

1. *Resulting trust; what creates, and how may be proved.*—If a husband purchases an estate with money, the corpus of his wife's separate estate, and takes a deed in his own name, a trust results to the wife which may be proved by parol.—*S. C.*..... 227
2. *Same.*—To raise a resulting trust the money advanced must form the consideration of the purchase and be converted into land. A subsequent advance will not suffice.—*S. C.*..... 227
3. *Husband's possession of property by; when will be considered in possession of the wife.*—Possession by a husband of property to which a trust in favor of his wife has attached, is the possession of the wife.—*S. C.*..... 227
4. *Bill to subject property of trust estate; who should be made parties.* Generally, both the trustees and *cestui que trust* should be made parties to a suit in equity respecting the subject-matter of the trust; but where the trusteeship is a naked trust, and there is no trustee, it seems that a decree may be rendered against the *cestui que trust*, when the proceeding is *in rem*.—*Sprague v. Tyson*..... 338

## WILLS.

1. *Will, what instrument is; how revocable.*—A writing purporting to be a will, executed by two persons, making a posthumous disposition of the property of the one who may first die, in favor of the other, and requiring the survivor to pay the expenses of the last sickness and burial of the decedent, and such debts as may be proved against his estate, is the separate will of the first decedent, and is revocable as other wills are.—*Schumaker v. Schmidt et al.*... 454
2. *Joint will; how will operate.*—Two or more persons may execute a joint will, which will operate as if executed separately by each; and will be entitled to and require a separate probate upon the death of each, as his will. But if the will so provides, and the disposition made of the property requires it, the probate should be delayed until the death of both or all the testators.—*S. C.*..... 454
3. *Mutual wills, how may sometimes be enforced.*—Mutual wills, duly executed, may, after the death of either party, in some cases be enforced in equity as a compact.—*S. C.*..... 454

## VARIANCE.

1. *Attachment and affidavit, variance between; how can not be taken advantage of.*—A variance between the affidavit and attachment and the complaint, can not be taken advantage of by demurrer to the complaint.—*Odom v. Shackelford*..... 331

## VENUE.

1. *Accused; right of to be present during prosecution.*—In all criminal prosecutions in the courts of this State, the accused has the right to be heard by himself and counsel, or by either, and for this purpose he must be present in court, whenever any action is taken in the prosecution, for the purpose of allowing him to be heard, should he desire it, except when orders are made for a continuance, when accused fails to appear, or of a like character, which are governed by the discretion of the court.—*Ex parte Bryan*..... 402
2. *Same; what order cannot be made in absence of.*—An order for the removal of the trial, in a criminal case, from the county in which the indictment was found, to the nearest county free from objections, can not be made in the absence of the accused from the court; on the making of such an order he is entitled to be present, and to be heard if he sees fit.—*S. C.*..... 402

## VENDOR AND PURCHASER.

1. *Lien for unpaid purchase-money of land.*—M. sold and conveyed by deed, with full warranty of title, in 1852, a tract of land to H. for \$800. Of this sum, \$300 were paid at the making of the deed, leaving a balance of \$500 of the purchase-money unpaid. For the payment of this \$500, H. executed his bond to M., of the same date with that of the sale, with this condition: "If the said title (the warranty deed) shall be sustained, and his (M.'s) right to make said deed shall be established, in a suit about to be commenced against me (H.) for said land, so that said title shall be declared a good and lawful title to said land, then the above bond shall be of full force against me (H.) for the payment of the money therein specified; but if such title shall fail, then I (H.) am bound to deliver said deed to M. as cancelled, upon which he (M.) is to deliver up the bond as cancelled." H. went into possession, under the contract of sale, and died in possession, and his distributees and representatives continued in the possession of the land after H.'s death, up to the filing of the bill, in February, 1862. No suit was ever brought against H. for the land, as was apprehended at the making of the bond, and nothing appeared to threaten the legal sufficiency of the title from M. to H. M. died in Georgia, in 1856, and his widow administered on his estate in that State, and thereafter was married during her administration to E., and E. and his wife, as administrator and administratrix, in Georgia, of M.'s estate, transferred and assigned the bond for \$500 to Mahone, the complainant,—*Held*, that the bond in the possession of Mahone, as transferee, is a lien upon said land for the unpaid purchase-money, and the suit to enforce the same was not prematurely brought.—*Mahone v. Haddock*..... 92
2. *Vendor's lien; what not destroyed by.*—The failure to present the bond for the balance of the unpaid purchase-money, to the administrator of a decedent within the time required by law to prevent a bar, does not cut off the vendor's lien; it only cuts off the right of the transferee to participate in the distribution of the estate

## VENDOR AND PURCHASER—CONTINUED.

- of H. with the other creditors who have duly presented their claims.  
*S. C.*..... 92
3. *Vendor, lien of; against whom exists.*—The lien of the vendor, for the purchase-money of real estate, exists against the vendee and against volunteers and purchasers under him, with notice, or having an equitable title only.—*Burch v. Carter et al.*..... 115
5. *Same; against whom does not exist.*—But the lien does not exist against purchasers under a conveyance of the legal estate, made *bona fide* for a valuable consideration, without notice, if they have paid the purchase-money.—*S. C.*..... 115
6. *Same; purchaser, what chargeable with notice of.*—The purchaser is chargeable with notice of every thing that appears on the face of the deeds in the chain of his title, but he is not bound to enquire into collateral circumstances.—*S. C.*..... 115
7. *Chancery, jurisdiction of; what sale will enjoin.*—A court of chancery will interpose and prevent a sale under an execution in behalf of a *bona fide* purchaser of real estate for a valuable consideration, when the purchase was made after the rendition of the judgment, on which the execution was issued, but before the delivery of the execution to the sheriff of the county where the property is situated.—*Martin v. Hewitt*..... 419
8. *Same.*—Such a sale, if permitted to be made, would be a cloud upon such purchaser's title, and as there is no remedy at law to prevent such a sale, or to remove the cloud that would thereby be brought upon his title, a court of chancery will, on his application, exercise its preventive jurisdiction and perpetually enjoin a sale under an execution, in such a case, and thereby quiet his title.  
*S. C.*..... 419

## WITNESS.

1. *Wife can not be witness against husband.*—In a prosecution for bigamy, the first and true wife can not be admitted to give evidence against her husband.—*Williams v. The State*..... 24
2. *Husband; when competent witness for wife.*—The husband is a competent witness for his wife to prove what disposition he has made of money belonging to her separate statutory estate.—*Robison et al. v. Robison, pro ami.*..... 227
3. *Admissions of what absent witnesses would prove; effect of.*—When a party, “for the purpose of a trial,” admits that certain absent witnesses, if present, “would prove the facts stated,” in an affidavit for a continuance, and which is made a part of the bill of exceptions, the facts so admitted are, to all intents and purposes, the testimony of such witnesses, and for the purposes of the trial, entitled to the same credit as if they had testified in open court. Unless such evidence is impeached or disproved, it must govern the judgment of the court in the same degree as any other testimony. It cannot be disregarded without some legal reason.  
*Snodgrass v. Clark*..... 198  
 See, also, *Crawford v. The State*..... 332  
 “ “ *Hughes v. Hughes*..... 699



## WITNESS—CONTINUED.

4. *Juror ; witness competent as.*—A juror is not incompetent, because he is a witness in the case.—*Bell v. The State*. . . . . 393
5. *Witness, refusal of to obey order, excluding from court-room ; practice to be pursued in such a case.*—When a witness disobeys the order excluding him from the court-room during the examination of witnesses, the better practice, where there has been no misconduct of the party calling him, is to admit his testimony, and punish him for the contempt.—*S. C.* . . . . . 393
6. *Witness, deposition of ; when will not be suppressed.*—The deposition of a witness will not be suppressed, on motion of the adverse party, because the witness had been furnished with a copy of the interrogatories and cross-interrogatories, before examination by the commissioner, unless the party complaining shows actual injury to him by such practice.—*Goodrich v. Goodrich*. . . . . 671
7. *Same ; when refusal to answer question, not cause for suppression of deposition.*—The refusal or failure of a witness to answer a question addressed to her on an examination before the commissioner, will not be held a sufficient reason to suppress such deposition on motion of the adverse party, when it appears that the interrogatory is sufficiently answered in another portion of the deposition, or that the answer would be immaterial on the trial on the merits of the cause.—*S. C.* . . . . . 671
8. *Agent ; what competent witness to prove.*—The agent of a company to whom application has been made for payment of a forged demand against the company, is a competent witness to prove his agency, in a prosecution for forgery against the person who attempted to collect the money.—*Manaway v. State*. . . . . 375









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